No. 84-1240

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

LAKE COAL COMPANY, INC., - - Petitioner,

versus

ROBERTS & SCHAEFER COMPANY, - Respondent.

On Writ of Certiorari to the Court of Appeals for the Sixth Circuit

---

JOINT APPENDIX

RONALD G. POLLY
GENE SMALLWOOD, JR.
POLLY, CRAFT, ASHER & SMALLWOOD
104 North Webb Avenue
Whitesburg, Kentucky 41858
(606) 633-4469
Counsel for Petitioner

C. KILMER COMBS
WYATT, TARRANT & COMBS
1100 Kincaid Towers
Lexington, Kentucky 40507
(606) 633-2012
Counsel for Respondent

Petition For Certiorari Filed January 30, 1985
Certiorari Granted March 25, 1985

TABLE OF CONTENTS

DOCKET ENTRIES

Date	No.	Proceedings U. S. District Court For The Eastern District of Kentucky
1983		
04/06	1	COMPLAINT — Summons & 2 copies issued with 2 copies each from 18A & Notice to atty. and delivered to attorney for plaintiff by Lexington office, with magistrate order & stip. attached, with Exhibits 1 & 2 attached.
04/29	5	ANSWER AND COUNTERCLAIM of defendant, Lake Coal Co., Inc.
	6	MOTION, of defendant, to dismiss or STAY and NOTICE that same will be heard at conven. of court with Exhibits A, B, C attached.
	7	MEMORANDUM, of defendant in support motion to dismiss, or STAY.
05/06	8	REPLY, of plaintiff to counterclaim of defendant.
	9	RESPONSE, of plaintiff to defendant's motion to dismiss or stay.
05/16	12	REPLY MEMORANDUM, of defendant.
05/19	13	RESPONSE, of plantiff to defendant's reply memorandum.
05/24	14	REPLY, of defendant to plaintiff's response.
05/25	15	SUPPLEMENTAL MEMORANDUM, of plaintiff.

Date	No.	Proceedings U. S. District Court For The Eastern District of Kentucky
1983		
07/15	17	ORDER: (GWU) sig. 7/14/83; that in interests of fairness to all parties concerned, as well as to avoid multiplicity of judicial time and effort and piece-meal litigation, Action now STAYED pend. final adjudication of aforementioned state action in Letcher Circuit Court. Copies as noted.
07/25	18	NOTICE OF APPEAL, of plaintiff. Attest Copy of Notice of Appeal, Form 411, 6CA-53, Rule 18, 6CA-32, 6CA-30 with update docket sheet to all counsel; CERTIFIED RECORD on appeal w/orig. & 1 copy 6CA-33 and update docket sheet to U. S. 6CCA w/copy 6CA-33 to all counsel. (INTERLOCUTORY APPEAL)

DOCKET ENTRIES

Date	No.	Proceedings U. S. Court of Appeals For The Sixth Circuit
1983		
08/05	1	Copy of notice of appeal, filed; and caused docketed
08/09		*Certified Record* (02 vol. pleadings) filed
09/09	8	Motion: appellant for a summary reversal of the district court's order staying the district court's proceedings pending final adjudication of the state action or in the alternative to expedite the proceedings on appeal (m-9/08) (See entry #18)

Date	No.	Proceedings U. S. Court of Appeals For The Sixth Circuit
09/09	9	Brief (10) of the appellant (m-9/08) & Filed 9/09
09/09	10	Certificate of service for both the brief and appendix submitted by the appellant
09/19	12	Response: appellee, in opposition, to appellant's motion for summary reversal or for advancement (m-9/16) (See entry #18)
11/03	18	Order denying appellant's motion to transmit a state court record and to summarily reverse the district court's order but granting the motion to advance this cause (Jones, Krupansky and Wellford, JJ.) (MOTIONS PANEL)
12/02	19	Brief (10) of the appellee (m-11/30)
12/06		Appendix (5) (m-12/07)
12/07	20	Certificate of service for the appendix
12/19		Reply Brief (10) of the appellant (m-12/15)
1984		
10/26	24	Cause argued by C. Kilmer Combs for appellant, Ronald Polly for appellee and case submittted to the Court (Before: Keith, Contie and Peck, JJ.)
11/20	25	Judgment of the District Court reversed and the case remanded with instructions to exercise jurisdiction (Keith, Contie and Peck, JJ.) (NFP)

Docket Entries

Date	No.	Proceedings U. S. Coutt of Appeals For The Sixth Circuit
1984		
12/03	26	Petition for Rehearing (m-12/01)
12/21	27	Order denying petition for rehearing (Keith, Contie and Peck, JJ.)
12/27	28	Motion: appellee to stay mandate pending application for writ of certiorari (m-12/26)
1985		
1/03	29	RESPONSE: appellant in opposition to stay mandate (m-1/2)
1/04	30	ORDER: granting stay of mandate until 2/4/85 (Contie, J.)
1/10	31	MOTION: appellant to reconsider stay of mandate w/memorandum in support (m-1/9)
1/16	32	ORDER: appellant to reconsider stay of mandate is denied (Contie, J.)
2/08	33	SUPREME COURT NOTICE: petition for writ of cert. filed 1/30/85 (Sup. Ct. No. 84-1240)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 83-119

Roberts & Schaefer Company, - - - *Plaintiff,*

v.

Lake Coal Company, Inc., - - - - *Defendant.*

COMPLAINT—Filed April 6, 1983

Serve: C. T. Corporations System
Kentucky Home Life Building
Louisville, Kentucky 40202

1. The Plaintiff is a corporation organized under the laws of the state of Delaware with its principal place of business in Chicago, Illinois. At no time has the Plaintiff been incorporated in or had any place of business in the Commonwealth of Kentucky. It has never been a citizen of Kentucky.

2. The Defendant is a corporation organized under the laws of the Commonwealth of Kentucky with its principal place of business in Roxana, Letcher County, Kentucky. At no time has the Defendant been incorporated in or had any place of business in either the state of Delaware or the state of Illinois. It has never been a citizen of any state other than Kentucky.

3. Jurisdiction of this action is based upon diversity of citizenship, 28 U.S.C. § 1332, and the amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs.

COUNT I

4. On September 14, 1981, the Plaintiff and Defendant entered into a contract for the construction of a coal preparation facility at Roxana, Letcher County, Kentucky. The contract was executed by the Plaintiff on August 26, 6, 1981, and by the Defendant on September 14, 1981. A copy of the contract is attached hereto as Plaintiff's Exhibit 1 and adopted by reference.

5. The Plaintiff promptly entered into the performance of the contract, constructed the coal preparation facility, and fulfilled all of its obligations and commitments under the contract. There is due Plaintiff, under the contract, the sum of $1,097,615.96, with interest.

6. Paragraph 11 of the contract entitled "FOUNDATIONS" provided that the Defendant would have soil core borings taken and analyzed by registered soil engineers and provide the Plaintiff with proper analyses and recommendations. Defendant furnished improper analyses and recommendations. As a result, it became necessary to use additional labor, materials, equipment and supplies in the performance of the contract, all of which was done at the special instance and request of the Defendant. The reasonable cost of such additional work, materials, equipment and supplies furnished by the Plaintiff is $300,000.00, with interest, which it is entitled to recover from the Defendant in addition to the contract price.

7. The Defendant has paid to the Plaintiff the sum of $3,414,111.00 on the contract price, leaving a balance of $1,097,615.96. Plaintiff is entitled to recover the balance of the contract price of $1,097,615.96 and in addition thereto $300,000.00 as the reasonable cost of labor, materials, equipment and supplies caused to be furnished by the Plaintiff as a result of the Defendant's failure to provide proper

soil analyses and recommendations, making a total of $1,397,615.96, with appropriate interest.

COUNT II

8. The Plaintiff adopts the allegations contained in paragraphs 1 through 7.

9. The last date on which the Plaintiff performed labor or furnished materials and supplied for the construction of the coal preparation facility pursuant to the contract between Plaintiff and the Defendant was February 1, 1983.

10. The total amount due Plaintiff with all just setoffs and credits known to it is $1,397,615.96, with interest. To secure the payment of this amount, the Plaintiff has and asserts a lien pursuant to KRS 376.010, et. seq. against all of the Defendant's right, title and interest in and to the real property owned by the Defendant upon which the labor, materials, equipment and supplies were furnished in the performance of the contract.

11. On February 16, 1983, Plaintiff caused a statement of mechanic's and materialman's lien to be filed, which is recorded at Encumbrance Book 16, page 357 in the Letcher County Court Clerk's Office. A certified copy of the lien statement is attached hereto as Plaintiff's Exhibit 2 and Plaintiff asserts a lien on Defendant's property therein described to secure the indebtedness.

12. The property cannot be divided without materially impairing its value and the Plaintiff's interest therein. No other person or entity owns any interest therein. The property should be sold as a whole to satisfy the Defendant's indebtedness to the Plaintiff.

WHEREFORE, the Plaintiff demands Judgment as follows:

Complaint—Filed April 6, 1983

1. Judgment against the Defendant Lake Coal Company, Inc. in the amount of $1,397,715.96 with appropriate interest.

2. A lien in Plaintiff's favor on the lands of Defendant described in Plaintiff's Exhibit 2 to secure payment of such indebtedness.

3. The property be sold to satisfy the indebtedness.

4. Plaintiff's costs.

(s) C. Kilmer Combs
C. Kilmer Combs
Wyatt, Tarrant & Combs
1100 Kincaid Towers
Lexington, Kentucky 40507
(606) 233-2012

(s) K. Gregory Haynes (CKC)
K. Gregory Haynes
Wyatt, Tarrant & Combs
2600 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

PLAINTIFF'S EXHIBIT 1

CONTRACT AGREEMENT

1. PROPOSAL: We (the "Contractor"), propose to furnish you (the "Owner"), at the price hereinafter stated, Coal Preparation Facility (the "Work").

This facility will be generally as shown on the Contractor's drawings and be, as generally, described in the Contractor's "Specifications". Drawings 8115-FS1, 8115-L1 through including 8115-14, all dated June 17, 1981.

This Proposal, together with the drawings and specifications, when duly accepted and approved as herein provided, is hereinafter called the "Agreement".

2. SITE PREPARATION: It is understood and agreed that you will furnish us the construction site free of any buildings or other obstructions and graded down to an even surface, ready for foundation excavation, to the elevations required by the final working drawings.

3. FURNISHING ENGINEERING DATA: It is agreed that you will furnish us all engineering data relative to the construction site such as land surveys, topographical maps, with details, dimensions and location of your related installations or machinery, which might influence our design or construction. It is further agreed that you will furnish, at the construction site, the coordinates and bench-mark elevations at a point to be agreed upon later and that any additional expense incurred by us, or by you, as a result of inaccuracy of data furnished by you will be borne by you.

4. FURNISHED BY OWNER: It is agreed that you will furnish without cost to us, the items listed under Specification item entitled "Duties by Owner".

5. FURNISHED BY CONTRACTORS: It is agreed that we will furnish all other materials, construction equipment, tools and labor necessary for the proper execution and completion of the Work covered by this Proposal.

6. Damages and Liens: We agree to hold and save you harmless from any loss arising from personal injury to property damage, caused solely by our negligence, and arising out of the work being performed by us; also to hold and save you harmless against all claims for wages to be paid and materials supplied by us entering into the construction of the facility, whether such claims are in the forms of mechanics liens or otherwise.

At the Owner's option and written demand, no partial or final payment hereunder shall be due until all waivers or partial waivers, as the case may be, of liens of all persons furnishing labor or material in connection with the Work shall be presented to the Owner.

7. Insurance: We will furnish and maintain such insurance as will protect us from claims under Workmen's Compensation Acts and from claims for damage because of bodily injury including death and because of property damage, which may arise from our performance of work covered by this Proposal.

We will also effect and maintain Builders All-Risk Insurance coverage upon the entirety of the Work encompassed within this proposal to one hundred percent (100%) of the insurable value thereof.

You will assume all risk on any materials furnished by you, and you will assume all risk on the facility on the date of your beneficial use or occupancy of the facility.

We will further provide and maintain Comprehensive General Liability and Comprehensive Automobile Liability Insurance in no less than the following amounts:

Bodily injury each person	$ 500,000.00
Bodily injury each occurrence	$1,000,000.00
Property damage	$ 100,000.00

You will be furnished certificates of insurance evidencing that said insurance is in effect and that you are a named insured therein. The policies will provide that the insurers will give you at least ten (10) days prior notice in the event of any alteration or cancellation of such insurance.

8. Patents and Claims: We will pay all royalties and process license fees and will defend all suits or claims for infringement of any patent rights and will save you harmless from loss on account thereof, except that you will be responsible for all such loss when a particular design, process, or the product of a particular manufacturer or manufacturers is specified or furnished by you for inclusion in the Facility.

9. Testing Period. It is agreed that after we have completed erection of the facility according to our plans and specifications, we will assist your personnel to place the same operation and instruct them in its proper operation. Upon our written notice of completion you will then have the next twenty (20) days during which the facility is in operation in which to test the facility, and to give our duly authorized representative a written "punch list" itemizing any objections. When all such punch list items have been corrected or satisfied, you will then have an additional twenty (20) operating days in which to signify acceptance or submit, in writing, further punch list items. These cycles of Owner punch list items and Contractor corrections shall continue until the facility is acceptable. Failure to submit punch list items within twenty (20) operating days or within any ten-day cycle thereafter following our notification of completion shall constitute an acceptance of the facility and all retained moneys shall then become due and payable; provided, however, that this paragraph shall not affect or restrict in any way your rights to all guarantees under this Agreement.

10. TITLE OF FACILITY: For security purposes only, the title and ownership of the property called for and furnished under the terms of this Contract shall remain with us until the full and final payment therefore in cash shall have been made according to the terms agreed upon, and notes, if any, shall have matured and been paid in full in cash. In case of default in any of the payments above provided for, we may repossess ourselves of the within mentioned property, and all additions thereto wherever found, and shall not be liable in any action of law, nor for the repayment of any money or moneys which may have been paid by you in part payment for said installation and equipment, and if said machinery or structure is placed upon mortgaged or encumbered premises, it shall be without prejudice to our rights thereto as herein provided. It is further agreed that no machinery to structure furnished under the Contract shall become a fixture by reason of being attached to real estate and any part thereof may be separated from the real estate and may be repossessed by us or our agent upon default in payment of the purchase money without any liability on the part of our company for such removal.

11. FOUNDATIONS: It is understood that this Proposal is based on dry earth (without rock) excavation and level ground and/or topography shown on our drawings, the absence of hydrostatic head or ground water, and that foundations are to be to the depth and extent shown on our plans and assumes soil bearing values as indicated in item entitled "Structures" of the preceding Specifications.

Upon the acceptance of the Proposal, the Owner shall have soil core borings taken at the locations of new structures and the borings analyzed by a registered soils engineer. Based upon the engineer's analysis and recommendations, the Contractor shall re-estimate foundation requirements and adjust the contract price accordingly.

Any foundations that should be required beyond those shown on our plans of this Proposal.

After we have proceeded with the design, should you require changes in the design of the foundations to meet your requirements, we will redesign according to your data, subject to your approval, on an actual cost basis as set forth in the Force Account Section of this Proposal.

12. CONTRACT PRICE: Price applicable to the Work encompassed by this Proposal is $4,228,000.

It is understood and agreed that the above quoted price is subject to increase by the amount of any Sales, Use or Occupational Tax, Manufacturer's Tax, Personal Property Tax or Excise Tax, levied or charged to us, or charged retroactively to us by Federal, State, Municipal or any other Governmental Agency applicable to the Work covered by this Proposal and not specifically provided for elsewhere herein.

Should this Proposal not be accepted within thirty (30) days from date hereof, it may be void at our option.

13. TIME OF COMPLETION: We agree to complete the Work under this proposal in accordance with the Bar Schedule appearing on Page 109 of this proposal.

14. TERMS OF PAYMENT: Terms of payment to be as follows: We will submit at the end of each month an invoice covering engineering or field work done and materials shipped, or in transit, or in process under progress payment billing during that month. Payment of ninety-five (95%) percent of this amount is to be made by you on or before the tenth day after date of such invoice. The remaining five (5%) percent is to be retained by you until the facility is completed and accepted as provided for in

this Agreement after which the retained funds become due and payable forthwith.

15. Payments on Delayed Shipments: If shipments of materials cannot be delivered or materials received because of delays caused by you, then you are to pay us the purchase price of such materials when ready for shipment.

16. Cancellation or Suspension: It is expressly agreed that should you, for any reason, after this Proposal has been accepted, desire to cancel the same or to suspend operations during the engineering or construction periods, for a period of in excess of a total of fifteen (15) days you may do so, but in that event, you are to pay us within thirty (30) days from the date of your order of cancellation or commencement of suspension, all costs and expenses attributable to the following:

A. Those incurred by reason of the cancellation or suspension;
B. Those incurred in carrying out the work, including office and traveling expenses;
C. Those incurred for material ordered or furnished;
D. Those incurred for all labor furnished;
E. Any additional costs or expenses incurred by us;

In addition to the above, you are to pay us fifteen percent (15%) of the total amount of all such items. Nonpayment of any billing for forty-five (45) days shall, at our option, constitute cancellation.

17. Bond: It is agreed that should you require us to furnish any bond on this work, you are to pay the premium for the same, in addition to the price of the Work hereinabove stated.

18. Delays and Extensions—Force Majeure: Any delays in or failure of performance by Contractor under

this agreement will not constitute default or give rise to any claims for damages or penalties if the delay or failure is caused by occurrences beyond the control of the Contractor. Such occurrences would include, but not be limited to, acts of God, acts of governmental authorities, strikes, labor problems, riots, rebellion, war, sabotage, fire, floods, explosions, inability to procure after diligent efforts, materials or labor contemplated for this agreement, and obstruction or delay of construction caused by Owner or its agents, and/or by any change or extra work order required by Owner. In the event of any such delay, the date of completion shall be extended for a period equal to the time lost by reason of delay.

19. Calculations of Capacities: It is understood and agreed that all calculations of capacities and rates referred to in the preceding Specifications are based on a short ton of two thousand pounds.

20. Future Improvements in Design: It is understood and agreed that although there may be future changes in the design of, or additions to, or improvements upon our standard products as are now contained in the Specifications, the models of such products as of the date hereof are to be installed in the facility. We will be under no obligation to modify the facility according to such future changes, additions or improvements.

21. Guarantee: We hereby warrant you that all material and equipment installed under this Proposal will be new unless otherwise specified, and that all work will be of good quality, free from faults and defects, and in conformance within one year from the date of initial operation of such machinery, we will supply to you, F.O.B. factory, free of charge, parts to replace such defective parts, provided such defects are not caused by the misuse or neglect

of the equipment. In consideration of furnishing such machinery parts, it is agreed that we are thereby relieved of any expense or damage due to such defects.

The express warranties and remedies set forth in this Proposal are exclusive and no other warranties or remedies of any kind, whether statutory, oral, written, express or implied, including any implied warranty of merchantability of fitness for a particular purpose shall apply. Owner's exclusive remedies and the Contractor's only obligations arising out of or in connection with defective equipment or workmanship, whether based on warranty, contract, tort, or otherwise shall be those stated herein. The Contractor shall in no event be liable for special or consequential damages.

22. Equipment and Materials: The manufacturer or brand of the equipment specified is intended only to be indicative of the quality proposed, and the Contractor reserves the right to furnish equipment of like quality if in his opinion it improves operation, delivery, or overall quality of the facility.

In preparing details of the facility covered by this Proposal, it is understood and agreed, that if found necessary by the Contractor, equivalent sections or material may be substituted to facilitate delivery, fabrication or design.

23. Changes in Design and Extra Work: The Contractor's responsibility and duties are limited to constructing a physical system or facility in accordance with the written terms of this Proposal and the Contractor's drawings and specifications.

Should you require any changes in the design of the facility as covered by this Proposal, to meet your requirements or otherwise, or any extra work not covered by this Proposal, it is distinctly understood that you are to pay for all extra engineering, labor and materials not called for by

our plans and specifications (including erection equipment rental) at actual cost as set forth in the Force Account Section of this Proposal.

No extra or force account work will be undertaken by the Contractor unless it is requested in writing by the Owner.

24. Remarks: It is understood and agreed that any treatment of process water required to adjust the pH value of said water is outside the scope of this Proposal. We assume no obligation to replace materials or equipment damaged by corrosive water after initial beneficial use by Owner. During the testing period, Contractor will advise Owner of recommended PH value and suggest means to obtain such value.

The Contractor's responsibility for environmental pollution is limited to that stipulated in the Proposal.

The Contractor will supply only such safety devices as are specified in this Proposal. Any additional safety measures or devices which may be required by law, or which you may wish to add, are to be furnished by you, or at your written request, they will be furnished on an actual cost basis as set forth in the Force Account Section of this Proposal.

It is expressly agreed that there are no promises, agreements or understandings outside of this Proposal.

25. Acceptance: This Proposal is subject to the written approval of an Executive Officer of the Company in Chicago, Illinois, and shall not be binding upon the Company until so approved.

Contract Agreement

Respectfully submitted,

Roberts & Schaefer Company
(s) Warren C. Gerler
Warren C. Gerler
Contracting Engineer

Accepted:

(s) John J. Innes
President, Lake Coal Co., Inc.

Date: September 14, 1981

Approved:

Roberts & Schaefer Company

(s) M. E. Prunty, Jr.
Executive Vice President

Date: Aug. 26, 1981

PLAINTIFF'S EXHIBIT 2

MECHANICS' AND MATERIALMEN'S LIEN

STATE OF KENTUCKY
COUNTY OF LETCHER

KNOW ALL MEN BY THESE PRESENTS:

The undersigned affiant, John T. Aubrey, counsel for ROBERTS & SCHAEFER COMPANY, a corporation, states that pursuant to the provisions of KRS. 376.010 et seq a lien is claimed against, in and upon the property referenced below of LAKE COAL CO., INC. of Roxana, Letcher County, Kentucky, in the sum of $1,397,615.96, with all known credits and set-offs having heretofore been deducted and no known other credits or set-offs now to such amount, on the following real property and appurtenances, located in Letcher County, Kentucky:

TRACT I

That same property conveyed to Lake Coal Co., Inc. by Jimmie Hogg and Doris Hogg by deed of conveyance dated November 9, 1981, and of record at Deed Book 259, page 418, records of the Letcher County Clerk's Office.

TRACT II

That same property conveyed to Lake Coal Company, Inc. by the Commonwealth of Kentucky by George L. Atkins, Secretary of the Department of Finance, by quitclaim conveyance dated April 6, 1981,and of record at Deed Book 257, page 179, records of the Letcher County Clerk's Office.

TRACT III

That same property conveyed to Lake Coal Co., Inc. by Jimmie Hogg and Doris Hogg by deed of conveyance

dated March 1, 1979, and of record at Deed Book 243, page 33, records of the Letcher County Clerk's Office.

TRACT IV

That same property conveyed to Lake Coal Co., Inc., by Jimmie Hogg and Doris Hogg by deed of conveyance dated March 1, 1979, and of record at Deed Book 243, page 29, records of the Letcher County Clerk's Office.

TRACT V

That same property conveyed to Lake Coal Co., Inc. by Billy Ray Banks and Carolyn Banks by deed of conveyance dated April 7, 1978, and of record at Deed Book 233, page 348, records of the Letcher County Clerk's Office.

TRACT VI

That same property conveyed to Lake Coal Co., Inc. by Shirley Ann Hogg Gentry by deed of conveyance dated March 7, 1978, and of record at Deed Book 233, page 91, records of the Letcher County Clerk's Office.

TRACT VII

That same property conveyed to Lake Coal Co., Inc. by Jimmie Hogg and Doris Hogg by deed of conveyance dated March 2, 1978, and of record at Deed Book 233, page 94, records of the Letcher County Clerk's Office, excepting that portion heretofore conveyed by Lake Coal Co., Inc. to Jimmie Hogg by deed of conveyance dated March 1, 1979, of record in Deed Book 243, page 37, Letcher County Clerk's Office.

That the work performed by Roberts & Schaefer Company was pursuant to contract between it and Lake Coal

Co., Inc. accepted by Lake Coal Co., Inc. on September 14, 1981 and pursuant to said contract Roberts & Schaefer Company performed labor, services and furnished supplies and materials for a facility commonly known as a coal preparation plant. The last work performed, services rendered or supplies and materials furnished was February 1, 1983.

Roberts & Schaefer Company hereby asserts a lien upon all the right, title and interest of Lake Coal Co., Inc., in the improvements on the said real estate and the above described real estate and the said Roberts & Schaefer Company claims a mechanics' and materialman's lien on said property for said amount.

This the 15th day of February, 1983.

(s) John T. Aubrey
John T. Aubrey, Counsel for Roberts & Schaefer Company, and Affiant

This instrument was prepared by:

(s) John T. Aubrey
Lyttle & Aubrey
Attorneys at Law
P. O. Box 451
Manchester, Kentucky 40962

STATE OF KENTUCKY
COUNTY OF CLAY

Subscribed and sworn to before me by John T. Aubrey, and personally known to me, this 15th day of February, 1983.

(s) Glenda Sester
Notary Public, Ky. State at Large

My commission expires:

April 14, 1986

STATE OF KENTUCKY
COUNTY OF LETCHER

I, Charlie Wright, of Letcher County Court do hereby certify that the foregoing Mechanics' and Materialmen's Lien was on the 16th day of February, 1983, lodged in my office for record and that it and this certificate, have been duly recorded in Enc. Bk. 16, page 351.

Witness my hand this 24th day of February, 1983.

Charlie Wright, Clerk
(s) By: Peggy J. Short, D.C.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 83-119

ROBERTS & SCHAEFER COMPANY, - - - *Plaintiff,*

v.

LAKE COAL COMPANY, INC., - - - - *Defendant.*

MOTION TO DISMISS OR STAY AND NOTICE

Filed April 29, 1983

Comes the defendant and moves the court to dismiss the complaint filed herein or stay this proceeding pending adjudication of Civil Action No. 82-CI-414, Lake Coal Co., Inc., a Kentucky corporation, versus Roberts and Schaefer Company, A Delaware corporation, Elgin National Industries, Inc., a Delaware corporation, Darby Construction Company, a Kentucky corporation, and Langley & Morgan Corporation, a Kentucky corporation, in the Letcher Circuit Court, Whitesburg, Kentucky, and for grounds states as follows:

1. That on November 12, 1982, the defendant herein filed its complaint in the Letcher Circuit Court against the plaintiff herein, Roberts & Schaefer Company, and other defendants, Elgin National Industry, Inc., Darby Construction Company, and Langley & Morgan Corporation, regarding, inter alia, a contract entered into by and between the defendant and plaintiff herein dated September 14, 1981, whereby the plaintiff was to furnish the defendant a coal preparation facility, including washer plant, static thickener, refuse bin, and connections thereto, and provide the

design, engineering, construction, installation and performance thereof on a "turn-key basis" at the defendant's land site at Roxana, Letcher County, Kentucky.

2. That on December 1, 1982, Roberts & Schaefer Company, the plaintiff herein, and Elgin National Industries, Inc., filed a petition for removal, bond and notice with the U. S. District Court for the Eastern District of Kentucky, and the action was docketed in the U. S. District Court, Civil Action No. 82-434.

3. That on December 3, 1982, Roberts & Schaefer Company, the plaintiff herein, filed its separate answer and counterclaim in Civil Action No. 82-434, a copy of which is attached hereto and made a part hereof and marked as Defendant's Exhibit A; that Lake Coal Company, Inc., the defendant herein, filed a reply to said counterclaim on December 23, 1982, a copy of which is attached hereto and made a part hereof and marked as Defendant's Exhibit B.

4. That on February 15, 1983, the U. S. District Court for the Eastern District of Kentucky entered an order finding that the District Court lacked original jurisdiction, pursuant to 28 U. S. Code §1332 (a)(1) and (c), remanded Civil Action No. 82-434 to the Letcher Circuit Court, pursuant to 28 U. S. Code §1447, and struck same from its active docket; that a copy of said order is attached hereto and made a part hereof and marked as Defendant's Exhibit C; that the action on remand, Civil Action No. 82-414, is currently pending in the Letcher Circuit Court.

5. That on April 6, 1983, the plaintiff herein filed its complaint in this action; that the plaintiff's complaint involves the same parties, demands the same or substantially the same remedies, and restates the same question previously presented in its counterclaim in Civil Action No. 82-CI-414, now pending in the Letcher Circuit Court;

that the plaintiff's complaint is no more than a renewed effort to remove the original action to federal court after this Court remanded the action to the state court for lack of jurisdiction.

6. That Roberts & Schaefer Company's cause of action was originally plead in its counterclaim in the Letcher Circuit Court and as such that court holds jurisdiction to the exclusion of the District Court until the original action is fully litigated and the state court's jurisdiction exhausted so as to avoid interference with the orderly and comprehensive disposition of the action by the state court.

7. That the plaintiff's complaint raises no federal questions which require the particular competence of the U. S. District Court.

8. That the plaintiff herein is not adversely affected by litigating its cause of action as stated in its counterclaim in the Letcher Circuit Court.

9. That the Letcher Circuit Court is in a position to promptly determine the entire controversy and to settle the rights of all parties, including those not named by the plaintiff in its complaint herein.

10. That as further grounds the defendant files herewith its memorandum.

WHEREFORE, the defendant moves the court to dismiss the complaint herein or to stay this action pending final adjudication of Civil Action No. 82-CI-414 in the Letcher Circuit Court.

Respectfully submitted,

Polly, Craft, Asher & Smallwood
(s) Ronald G. Polly
Ronald G. Polly
Gene Smallwood, Jr.
P.O. Box 786
Whitesburg, Kentucky 41858
606-633-4469

Cook & Wright
(s) Forrest E. Cook
Forrest E. Cook
P.O. Box 909
Whitesburg, Kentucky 41858
606-633-4469

N O T I C E

The parties hereto and their attorneys are hereby notified that the undersigned will bring the foregoing Motion on for hearing before the Honorable G. Wix Unthank, Judge of the U. S. District Court, Eastern District of Kentucky, Pikeville Division, at such date, time and place as the Court shall order.

Polly, Craft, Asher & Smallwood
(s) Ronald G. Polly
Ronald G. Polly
Gene Smallwood, Jr.
P.O. Box 786
Whitesburg, Kentucky 41858
606/633/4469

(Certificate of Service omitted in printing.)

DEFENDANT'S EXHIBIT A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 82-434

LAKE COAL CO., INC., - - - - - *Plaintiff,*

v.

ROBERTS & SCHAEFER COMPANY, Et. Al., - *Defendants.*

SEPARATE ANSWER AND COUNTERCLAIM OF ROBERTS & SCHAEFER COMPANY

Filed December 3, 1982

FIRST DEFENSE

1. The Complaint, and each Count thereof, fail to state a claim against this answering defendant upon which relief may be granted.

SECOND DEFENSE

2. This answering defendant admits that plaintiff is a corporation organized and existing under the laws of the state of Kentucky with its office and principal place of business at P. O. Box 129, Roxana, Letcher County, Kentucky 41848. It further admits that the defendant Elgin National Industries, Inc. is a corporation organized and existing under the laws of the state of Delaware with an office, place of business and mailing address of 120 South Riverside Plaza, Chicago, Illinois 60606, and is the parent company of Roberts & Schaefer Company. This defendant admits

the allegations of paragraph (4) of Count I of the Complaint.

3. This answering defendant further admits that on September 14, 1981, the plaintiff and the defendant Roberts & Schaefer Company entered into a written contract for the construction of a coal preparation facility more particularly identified therein, the terms of which are set out in the original document executed by the defendant Roberts & Schaefer Company on August 26, 1981, and by the plaintiff Lake Coal Co., Inc. on September 14, 1981. This answering defendant further admits that the defendant Roberts & Schaefer Company entered upon the performance of such contract promptly after the execution thereof by the parties thereto. It further admits that the defendants Darby Construction Company and Langley & Morgan Corporation, as subcontractors of Roberts & Schaefer Company, performed certain portions of the contract in a workmanlike manner in conformity with the contract.

4. This answering defendant denies each and every allegation of Count I of the Complaint except those expressly admitted herein.

5. This answering defendant denies each and every allegation of Count II of the Complaint except those expressly admitted herein.

6. This answering defendant denies each and every allegation of Count III of the Complaint except those expressly admitted herein.

7. This answering defendant denies each and every allegation of Count IV of the Complaint except those expressly admitted herein.

8. All allegations of the Complaint not expressly admitted herein are denied.

THIRD DEFENSE

9. The damages claimed by the plaintiff in the Complaint were caused solely by the negligence and carelessness of the plaintiff in providing Roberts & Schaefer Company improper soil core borings analysis and recommendations in violation of the terms and provisions of the contract.

10. The plaintiff was guilty of contributory negligence which was the sole cause of the damages complained of in the Complaint, but for which they would not have occurred.

FOURTH DEFENSE

11. This answering defendant says that under the contract there is a warranty limited solely to replacement of parts and repair of the facility should any workmanship, material or equipment be defective, as set forth in paragraph 21. "GUARANTEE:". Under the contract all other claims for damages are waived and released.

FIFTH DEFENSE

12. The damages complained of in the Complaint were caused by independent and superseding causes brought about by negligence and breaches of contract by the Plaintiff prior to and during performance of the contract.

COUNTERCLAIM

13. Roberts & Schaefer Company adopts all of the allegations and admissions of the Answer.

14. Roberts & Schaefer Company promptly entered into the performance of the contract of September 14, 1981, between it and the plaintiff, constructed the coal prepara-

tion plant, and fulfilled all of its obligations and commitments under the contract.

15. The contract provided in paragraph 11. "FOUNDATIONS:" the plaintiff would have soil core borings taken and analyzed by a registered soils engineer and provide Roberts & Schaefer Company with a proper analysis and recommendations. The plaintiff failed to provide proper soil core borings, a proper engineering analysis and proper recommendations. As a result, it became necessary to furnish additional labor, materials and equipment and consume additional time in the performance of the contract, all of which was done at the special instance and request of the plaintiff. The reasonable cost of such additional work, materials and equipment supplied by Roberts & Schaefer Company is $300,000.00, which it is entitled to recover from the plaintiff.

16. The plaintiff has paid to Roberts & Schaefer Company the sum of $3,414,111.00 on the contract price, leaving a balance of $1,097,615.96. The defendant Roberts & Schaefer Company is entitled to recover the balance of the contract price of $1,097,615.96 and in addition thereto the reasonable cost of labor, materials and equipment caused to be furnished by Roberts & Schaefer Company as a result of plaintiff's breach of the contract amounting to $300,000.00, making a total of $1,397,615.96, with appropriate interest.

WHEREFORE, the defendant Roberts & Schaefer Company demands that the Complaint be finally dismissed and plaintiff recover nothing thereby; demand judgment against the plaintiff in the sum of $1,397,615.96, with interest; demands its costs and all appropriate relief.

(s) C. Kilmer Combs by A. S. Good
C. Kilmer Combs
Wyatt, Tarrant & Combs
1100 Kincaid Towers
Lexington, Kentucky 40507
(606) 233-2012

(s) Spencer D. Noe by A. S. Good
Spencer D. Noe
Stoll, Keenon & Park
1000 First Security Plaza
Lexington, Kentucky 40507
(606) 259-0444

Attorney for Defendants

(Certificate of Service omitted in printing.)

DEFENDANT'S EXHIBIT B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 82-434

LAKE COAL CO., INC., - - - - - *Plaintiff,*

v.

ROBERTS & SCHAEFER COMPANY, Et. Al., - *Defendants.*

REPLY—Filed December 23, 1982

Comes the plaintiff, and for its reply to the counterclaim of the defendant, Roberts & Schaefer Company, herein says:

(1) That this action has been improvidently removed from the Letcher Circuit Court, and it adopts all the allegations contained in its motion to remand filed herein.

(2) That this Court is without jurisdiction of the subject matter of this action.

(3) That the counterclaim fails to state a claim against the plaintiff upon which relief can be granted.

(4) That it admits the allegations contained in Paragraphs 2. and 3. of the separate answer of Roberts & Schaefer Company, except that it denies that the defendants, Darby Construction Company and Langley & Morgan Corporation, as subcontractors of Roberts & Schaefer Company, performed certain portions of the contract in a workmanlike manner in conformity with the contract; that it denies each and all the other allegations contained in the separate answer of Roberts & Schaefer Company and Paragraph 13. of the counterclaim.

(5) That it admits that it paid to Roberts & Schaefer Company the sum of $3,414,111. on the contract price; that it denied each and all the allegations contained in paragraphs 14., and 15. and 16. of the counterclaim, except those expressly admitted hereinabove.

(6) That the defendant, Roberts & Schaefer Company, breached said contract, negligently performed its work on the coal preparation plant, concealed, misrepresented and fraudulently performed certain obligations required under said contract, or breached the express and implied warranties contained in said contract and undertakings of material, equipment and work of good quality free from faults and defects, and the plaintiff relies on the aforesaid illegal and wrongful actions or omissions by the defendant, Roberts & Schaefer Company, as a complete bar to the counterclaim.

(7) That it adopts all the allegations contained in its complaint herein, and relies on the claims and damages asserted therein as a complete bar to the counterclaim.

WHEREFORE, the plaintiff demands that the counterclaim be dismissed and nothing recovered thereby; demands judgment in accordance with its complaint herein; demands its costs and all proper relief.

Plaintiff demands a jury trial of all issues triable by a jury.

(Certificate of Service omitted in printing.)

Reply—Filed December 23, 1982

Polly, Craft, Asher & Smallwood
(s) Ronald G. Polly
Ronald G. Polly
P. O. Box 786
Whitesburg, Kentucky 41858
606/633/4469

Cook & Wright
(s) Forrest E. Cook
Forrest E. Cook
P. O. Box 909
Whitesburg, Kentucky 41858
606/633/9351
Attorneys for Lake Coal Co., Inc.

(Certificate of Service omitted in printing.)

DEFENDANT'S EXHIBIT C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 82-434

LAKE COAL CO., INC., - - - - - - *Plaintiff,*

v.

ROBERTS & SCHAEFER COMPANY, Et. Al., - *Defendants.*

ORDER—Filed February 15, 1983

The plaintiff having moved the Court to remand this action to Letcher Circuit Court, from whence it was removed, on the grounds that this Court does not have original jurisdiction under the provisions of Title 28 U. S. Code, §1332(a)(1) and (c), and therefore, this action may not be removed to this Court, pursuant to the provisions of Title 28 U. S. Code, §1441; the defendants having responded thereto, and the Court being duly advised,

IT IS HEREBY ORDERED, as follows:

1. Plaintiff's motion to remand is SUSTAINED. It is obvious to the Court that the requisite diversity is lacking herein; therefore, this Court has no jurisdiction.

2. This action shall be, and is now, STRICKEN from the active docket of the Court.

This the 15th day of February, 1983.

(s) G. Wix Unthank,
G. Wix Unthank, Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 83-119

ROBERTS & SCHAEFER COMPANY, - - - *Plaintiff,*

v.

LAKE COAL COMPANY, INC., - - - - *Defendant.*

MEMORANDUM FOR DEFENDANT

Filed April 29, 1983

The complaint filed herein is the same suit pending by the same parties for the same cause previously filed in Letcher Circuit Court, Whitesburg, Letcher County, Kentucky, in Civil Action No. 82-CI-414. Lake Coal Company, the defendant herein, filed its complaint on November 12, 1982, in the Letcher Circuit Court, Roberts & Schaefer Company filed its answer and counterclaim therein on December 3, 1982, and Lake Coal Company, Inc., filed its reply on December 28, 1982.

It is the general rule that the court which first acquires jurisdiction shall proceed without interference from a court of another jurisdiction. The fact that the state court obtained jurisdiction over the cause of action through Roberts & Schaefer Company filing of its counterclaim therein, before it filed a similar action in the federal court, grants jurisdiction to the state court of the cause of action to the exclusion of the federal court until the state court's duty is fully performed and the jurisdiction involved in exhausted. *Gillis* v. *Keystone Mutual Casualty Company,*

172 F. 2d 826, *cert. den'd* 338 U. S. 822 (1949). See also, *Bowles* v. *Lee,* 59 F. Supp. 639 (D. C. Ky. 1945).

In *Mitter* v. *Massa.,* 237 F. Supp. 915 (D. C. NY. 1965), plaintiff art promoters sought, in the federal court action, an injunction directing the defendant artist to deliver his paintings pursuant to a contract entered into between the parties. The artist had earlier commenced an action against the promoters in a state court, their answer in which contained a counterclaim seeking the same relief as that sought in the action in the federal court. Therein, the court, as an exercise of its inherent powers, granted a stay of the proceeding because all the relief sought by the plaintiffs in the case had been requested in their counterclaim previously instituted in the state action, which was competent to dispose of the dispute between the parties.

There is a three-fold rationale why this court should dismiss the plaintiff's complaint or stay this action pending determination of the same or substantially same action before the Letcher Circuit Court. First, comity is the essential consideration recited by the federal courts in deferring to actions in state courts which have earlier acquired jurisdiction of the same matter in dispute between the parties and the federal action. *Hearing Aid Association of Kentucky, Inc.* v. *Bullock,* 413 F. Supp. 1032 (D.C. Ky. 1976). Comity is given a broad application as a general principle contraindicative of action by a federal court which will interfere with the proceedings and procedures in state court. So, in a number of cases the courts have recognized non-interference in state courts as a matter of judicial policy to be implemented by a dismissal or a stay of action in the federal court until the determination of the similar action pending in state court. In *Klanian* v. *New York L. Insurance Company,* 39 F. Supp. 777 (D.C. RI.

1941), the court granted a stay of proceeding stating that it was the duty of the federal court, in the exercise of comity, not to interfere with the orderly administration of justice in the state court except in a plain case of exceptional circumstances warranting such intereference. Similarly, the court in *Greer* v. *Scearce,* 53 F. Supp. 807 (D.C. Mo. 1944), stayed the proceeding in the federal court until the parties had had a reasonable opportunity to have the issues determined in the case previously pending in the state court in order to avoid the gratuitous interference with the orderly and comprehensive disposition of a state court litigation.

Secondly, the wastefulness inherent in duplicative litigation proceedings concurrently in state and federal courts has been generally recognized as another reason to dismiss or stay this action pending outcome of the similar action in the state court. See *Massachusetts* v. *Missouri,* 308 U. S. 1 (1939). In *P. Beiersdorf & Company* v. *Duke Laboratory, Inc.,* 92 F. Supp. 287 (D.C. NY. 1950), the federal court stayed the federal action pending adjudication of a similar action in state court noting that public policy required the court to actively avoid any waste of judicial time and energy. Because the courts are already heavily burdened with litigation with which they must, of necessity, deal, they should therefore, not be called upon to duplicate the state court's work in cases involving the same issues and same parties. *Reiter* v. *Universal Marion Corp.,* 173 F. Supp. 13 (D.C. D.C. 1959). Also, the defendant herein should not be harrassed and vexed with two actions pending in two separate courts over the same subject matter. *Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.,* 89 F. Supp. 167 (D.C. NY. 1950). In *Greer* v. *Scearce, supra,* the court stayed the federal action pending adjudication

of a suit previously filed in the state court because the court held that it would be uneconomical as well as vexatious for the federal court to proceed in an action where another suit was pending in a state court presenting the same issues, not governed by federal law, between substantially the same parties. Similarly, the court in *Vanderwater* v. *City National Bank,* 28 F. Supp. 89 (D.C. Ill. 1939), held in abeyance a suit until adjudication of a pending cause in a state court because it was not seemly or proper for the parties to be subjected unnecessarily to the cost and expense of two different courts.

Thirdly, the court should dismiss the complaint or stay this action because the federal action does not include all the parties that are before the state court. In *Brendle* v. *Smith,* 46 F. Supp. 522 (D.C. NY. 1942), the court granted a stay of proceedings in federal court until a final determination of a similar suit in state court, noting that some of the parties named in the state suit were not included in the federal action. The court stated that because the state action was more inclusive than the federal action, it should be given the right of way to proceed. See also, *Reider* v. *Universal Marion Corp., supra,* and *Greer* v. *Scearce, supra.*

Actually, the Letcher Circuit Court is the proper venue and jurisdiction for the trial of the cause of action alleged originally in the counterclaim filed in state court by Roberts & Schaefer Company as is demonstrated by the fact that the same action was remanded to the state court by this Court pursuant to 28 U. S. Code §1447, for lack of original jurisdiction by order dated February 15, 1983, in Civil Action No. 82-434 as shown by Exhibit C filed with the defendant's motion herein. After having failed before to have its cause of action moved to federal court the plain-

tiff now tries, indirectly, to accomplish what this Court would not permit it to do directly even in the face of its prior counterclaim filed in the Letcher Circuit Court.

It is clear that the Court, in an exercise of its inherent powers, can also dismiss this action because the forum for adjudication was set in the state court when the plaintiff previously filed its counterclaim therein, which presents the same claim as it alleges in its complaint herein.

Therefore, the defendant respectfully submits that the complaint herein should be dismissed or stayed pending the disposition of the case in the Letcher Circuit Court, Civil Action No. 82-CI-414.

Respectfully submitted,

Polly, Craft, Asher & Smallwood
(s) Ronald G. Polly
Ronald G. Polly
Gene Smallwood, Jr.
P.O. Box 786
Whitesburg, Kentucky 41858
606/633/4469

Cook & Wright
(s) Forrest E. Cook
Forrest E. Cook
P.O. Box 909
Whitesburg, Kentucky 41858
606/633/9351

(Certificate of Service omitted in printing.)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 83-119

ROBERTS & SCHAEFER COMPANY, - - - *Plaintiff*,

v.

LAKE COAL COMPANY, INC., - - - *Defendant*.

ANSWER AND COUNTERCLAIM—Filed April 29, 1983

ANSWER

Comes the defendant, and for its answer herein, says:

(1) That this action should be dismissed or stayed because the same action has been filed by the plaintiff against the defendant in Civil Action No. 82-CI-414 of the Letcher Circuit Court as removed to Civil Action No. 82-434 of the Federal District Court at Pikeville, and remanded to the Letcher Circuit Court by Order entered February 15, 1982.

(2) That this court is without jurisdiction of the subject matter of this action because same has been preempted by plaintiff's filing of the same action in the Letcher Circuit Court.

(3) That the complaint fails to state a claim against the defendant upon which relief can be granted.

(4) That it admits that the plaintiff is a corporation organized under the laws of the state of Delaware, but it is without sufficient knowledge or information upon which to form a belief about the other allegations contained in numerical paragraph 1. of the complaint, and therefore denies same.

(5) That is admits the allegations contained in numerical paragraph 2. of the complaint.

(6) That it admits the allegations contained in numerical paragraph 4. of COUNT I of the complaint, except it denies that a copy of the contract was attached to the copy of the complaint served on it.

(7) That it admits that the plaintiff entered into the performance of the contract to construct the coal preparation facility, but it denies each and all the other allegations contained in numerical paragraph 5. of COUNT I of the complaint.

(8) That it admits that the amount in controversy exceeds the sum of $10,000., exclusive of interest and costs, and admits that Paragraph 11. of the Contract entitled "FOUNDATIONS" provided that the defendant would have soil core borings taken and analyzed by a registered soils engineer, but it denies each and all the other allegations contained in numerical paragraph 3. of the complaint and numerical paragraph 6. of COUNT I of the complaint.

(9) That it admits that it paid the plaintiff the sum of $3,414,111. on the contract price, but it denies each and all the other allegations contained in numerical paragraph 7. of COUNT I of the complaint.

(10) That it denies each and all the allegations contained in numerical paragraph 8. of COUNT II of the complaint, except such as are admitted hereinbefore.

(11) That it denies each and all the allegations contained in numerical paragraphs 9., 10. and 12. of COUNT II of the complaint.

(12) That it admits that on February 16, 1983, plaintiff caused an alleged lien to be filed, which is recorded in Encumbrance Book 16, page 357 in the Letcher County Court Clerk's Office, but it denies that a certified copy of

the lien statement was attached to the copy of the complaint served on it; that it denies such lien statement, and its validity and all other allegations contained in numerical paragraph 11. of COUNT II of the complaint.

(13) That the plaintiff, Roberts & Schaefer Company, its agents, servants, employees and subcontractors breached said contract, negligently performed its work on the coal preparation plant, concealed, misrepresented and fraudulently performed certain obligations required under said contract, or breached the express and implied warranties contained in said contract and undertakings of material, equipment and work of good quality, free from faults and defects, and the defendant relies on the aforesaid illegal and wrongful actions or omissions by the plaintiff, its agents, servants, employees and subcontractors as a complete bar to the complaint.

(14) That it adopts all the allegations contained in its counterclaim herein, and relies on the claims and damages asserted therein as a complete bar to the complaint.

WHEREFORE, the defendant demands that the complaint be dismissed and nothing recovered thereby; that this action be stayed pending final adjudication of Civil Action No. 82-CI-414 in the Letcher Circuit Court; demands judgment in accordance with its counterclaim herein, and demands its costs and all other relief.

Defendant demands a jury trial of all issues triable by a jury.

COUNTERCLAIM

Comes the defendant, and for its counterclaim herein, says:

Answer and Counterclaim—Filed April 29, 1983

COUNT I

(1) That it adopts all the allegations contained in its answer above.

(2) That on September 14, 1981, the plaintiff and defendant entered into a contract whereby said plaintiff was to furnish the defendant a coal preparation facility, including washer plant, static thickener, refuse bin, and connections thereto, and provide the design, engineering, construction, installation and performance thereof on a "turn key" basis at the defendant's land site at Roxana, Letcher County, Kentucky, according to the specifications incorporated within said contract, for the payment of $4,228,000., provided therein; that said contract is referred to and the subject matter of plaintiff's complaint herein; that thereafter, certain additions were made to said contract for payment of $302,052.

(3) That Elgin National Industries, Inc., as parent company of Roberts & Schaefer Company, its subsidiary, the agents, servants and employees of said plaintiff acting in the course and scope of their employment, participated in the negotiation, inducement and performance of said contract in Letcher County, Kentucky, and Elgin National Industries, Inc., as aforesaid, undertook to advise, supervise, assist, participate with, and direct Roberts & Schaefer Company, in the furnishing of said coal preparation plant and the design, engineering, construction, installation and performance thereof as reasonably required to insure and facilitate the proper and timely performance of the work under said contract.

(4) That for the payments aforesaid, the plaintiff, Roberts & Schaefer Company, contracted, and Elgin National Industries, Inc., undertook as aforesaid, to properly furnish, design and install the coal washing plant facilities

Answer and Counterclaim—Filed April 29, 1983

aforesaid to operate with a washing capacity of three hundred (300) tons of coal per hour, for completion no later than April 1, 1982.

(5) That on or about September, 1981, the plaintiff, its agents, servants, employees, subcontractors and Elgin National Industries, Inc., began the actual performance of the obligations and work provided in the contract and undertakings aforesaid, and during the month of March, 1982, the plant was prepared for operational testing, and the static thickener thereof was filled with water for the purpose of settling and removing impurities from the coal washing water transmitted from the washing plant; that thereupon, the observation and inspection of the static thickener revealed that thousands of gallons of water leaked from the bottom of the tank because the concrete thereof had cracked and separated, and that the entire coal preparation facility was inoperable under the contract; that subsequent thereto, the testing, observation and inspection of the washing plant, conveyors and refuse bin, were demonstrated to be inoperable under the contract; that on April 1, 1982, and up to the present time, the entire coal preparation facility, including the washing plant, static thickener, conveyers and refuse bin, have been inoperable under said contract, and the substantial performance of said contract and undertakings by the plaintiff, its agents, servants, employees, subcontractors and Elgin National Industries, Inc. have failed.

(6) That since said plaintiff began its performance of the contract and undertakings aforesaid, and up to the present time, the said plaintiff, its agents, servants, employees and subcontractors, have illegally and wrongfully violated the contract and undertakings aforesaid, and il-

legally and wrongfully failed to perform the obligations thereof in the following respects:

(a) Said plaintiff failed to properly design, construct and install the static thickener of said facility and the bottom thereof according to reasonable and standard practices for such design, construction and installation, and in accordance with the specifications of the contract.

(b) Said plaintiff failed to design or install the concrete bottom of the static thickener to include sufficient reinforcement steel to keep it from cracking and leaking, according to reasonable and standard practices therefor.

(c) Said plaintiff failed to integrate the wire mesh intended for that purpose into the concrete bottom of the static thickener to keep it from cracking and leaking, according to reasonable and standard practices therefor.

(d) Said plaintiff failed to maintain a dry area where the concrete bottom of the static thickener was poured upon the earth in a circle area 75 feet in diameter, and in fact poured said concrete bottom upon wet saturated earth in disregard of the reasonable and standard practices therefor, and which actions contributed to cause the said concrete bottom to crack and leak.

(e) Said plaintiff constructed the foundation for the static thickener of said facility out of level contrary to the reasonable and standard practices therefor under the contract.

(f) Said plaintiff constructed the foundation for the refuse bin of said facility out of level contrary to the

reasonable and standard practices therefor under the contract.

(g) Said plaintiff failed to properly design, construct and install the washing plant, conveyor belts, refuse bin, and the components thereof, according to the reasonable and standard practices therefor under the contract, including but not limited to, causing faulty and inadequate operation of the welding, chutes, refuse, belts, gates, flow of refuse, rate of disposal, belt wipers, sieve bins, water dischargers, chemical feeds, switches, and the mechanisms thereof.

(h) Said plaintiff failed to design, construct and install said coal preparation facility, and the components thereof, to maintain the design feed rate of three hundred (300) tons of coal per hour for a sustained period of time under the specifications of the contract.

(7) That Darby Construction Company and Langley & Morgan Corporation, as subcontractors, agents, servants and employees of Roberts & Schaefer Company and Elgin National Industries, Inc., actually performed the obligations under said contract and undertakings aforesaid of pouring the concrete bottom of said static thickener, and illegally and wrongfully failed to properly integrate the wire mesh intended for that purpose into the concrete bottom thereof and failed to maintain the earth area thereunder in a dry condition, to prevent said concrete from cracking and leaking, according to reasonable and standard practices therefor under the contract.

(8) That the actions or omissions aforesaid of Roberts & Schaefer Company, Elgin National Industries, Inc., Darby Construction Company and Langley & Morgan Corporation, constitute breaches of the contract and under-

takings aforesaid, and constitute failure of substantial performance thereof.

(9) That the plaintiff knew, or should have known, the business of the defendant and its losses reasonably expected to be incurred in the event of substantial delay in the performance of the obligations under said contract and undertakings, for failure of the plaintiff to deliver proper operation of the coal preparation facility, and the components thereof, within the time provided in said contract and undertakings.

(10) That the illegal and wrongful actions or omissions and breaches of the plaintiff, its agents, servants, employees and subcontractors, aforesaid have proximately caused the defendant to suffer loss of expenses, wages, fees, travel, electricity and interest, in the sum of $454,047., and such additional sums thereof in the future as the evidence shall show.

(11) That the illegal and wrongful actions or omissions and breaches of the plaintiff, its agents, servants, employees and subcontractors, aforesaid have proximately caused the defendant to suffer loss by payments of required minimum royalties on coal leases held by the defendant which could not, and cannot, be mined as recoupment for lack of said coal preparation facility as contracted to be installed as aforesaid, in the sum of $1,133,479., and such additional sums in the future as the evidence shall show.

(12) That the illegal and wrongful actions or omissions and breaches of the plaintiff, its agents, servants, employees and subcontractors, aforesaid, have proximately caused the defendant to suffer loss of stockpiled coal it purchased in reliance upon the proper performance of said contract and undertakings by the plaintiff, in the sum of $625,000.

(13) That the illegal and wrongful actions or omissions and breaches of the plaintiff, its agents, servants, employees and subcontractors, aforesaid have proximately caused the defendant to suffer probable loss from contingent liabilities for loans and interest payments on behalf of contract miners in preparing to mine coal for said coal preparation facility, in the sum of $1,000,000.

(14) That the illegal and wrongful actions or omissions and breaches of the plaintiff, its agents, servants, employees and subcontractors, aforesaid have proximately caused the defendant to essentially cease its operations and be critically delayed in progress and completion thereof, and suffer loss of profits from business opportunities and long term coal contract opportunities with commercial, industrial and public utility purchasers of washed coal, which contracts could not be taken and entered into by reason of the illegal and wrongful delay, actions or omissions and breaches of the plaintiff, in the sum of $22,500,000., and such additional sums in the future as the evidence shall show.

COUNT II

(1) That the defendant reiterates, realleges and adopts each and all the allegations contained in the foregoing numerical paragraphs (1) - (7) and (9) of Count I hereof.

(2) That the actions or omissions of the plaintiff, its agents, servants, employees and subcontractors, aforesaid were due to the carelessness and negligence of the plaintiff, its agents, servants, employees and subcontractors, in the design, engineering, construction and installation of the aforesaid washing plant, static thickener, conveyers and refuse bin, in the particulars as enumerated in numerical paragraph (6) (a) - (h) and (7) of Count I hereof, which are adopted herein by reference.

(3) That as a proximate result of the carelessness and negligence of the plaintiff, its agents, servants, employees and subcontractors, as aforesaid, the defendant was caused to, and will, suffer the losses and in the sums as specifically enumerated in numerical paragraphs (10) - (14) of Count I hereof, which are incorporated herein by reference.

COUNT III

(1) That the defendant reiterates, realleges and adopts each and all the allegations contained in the foregoing numerical paragraphs (1) - (7) and (9) of Count I hereof.

(2) That the illegal and wrongful actions or omissions of the plaintiff, its agents, servants, employees and subcontractors, in designing, constructing and installing the foundations for the static thickener and refuse bin of said facility out of level contrary to the reasonable and standard practices therefor and other illegal and wrongful actions or omissions of the plaintiff, its agents, servants, employees and subcontractors, specifically enumerated in numerical paragraph (6) (a) - (h) of Count I hereof, which are adopted herein by reference, are shoddy, faulty and defective work, and were realized and known, or should have been known, by the plaintiff sufficiently early in the contract period within which to have remedied same when originally done, and thereby avoid harm and loss to the defendant, but the plaintiff, its agents, servants, employees and subcontractors concealed and misrepresented such illegal and wrongful actions or omissions to the extent and for the period that such constitutes fraud upon the defendant therefor.

(3) That as a proximate result of the concealment, misrepresentation and fraud of the plaintiff, its agents, servants, employees and subcontractors, aforesaid, the defendant suffered the losses and in the sums as specifically enumerated in numerical paragraphs (10) - (14) of Count I hereof, which are adopted herein by reference

COUNT IV

(1) That the defendant reiterates, realleges and adopts each and all the allegations contained in the foregoing numerical paragraphs (1) - (7) and (9) of Count I hereof.

(2) That the illegal and wrongful actions or omissions of the plaintiff, its agents, servants, employees and subcontractors, as enumerated in numerical paragraph (6) (a) - (h) and (7) of Count I hereof, which are incorporated herein by reference, constitute breaches, failures and violations of the express and implied warranties contained in said contract and undertakings of material, equipment and work of good quality, free from faults and defects, and illegally and wrongfully resulted in said coal preparation facility, and its component parts, being totally unfit for the purpose intended and guaranteed by the plaintiff, its agents, servants, employees and subcontractors, under said contract and undertakings.

(3) That as a proximate result of the illegal and wrongful actions or omissions of the plaintiff, its agents, servants, employees and subcontractors, as aforesaid, the defendant has suffered the losses and in the sums as specifically enumerated in numerical paragraphs (10) - (14) of Count I hereof, which are incorporated herein by reference.

WHEREFORE, the defendant demands judgment against the plaintiff as follows:

(a) That it recover of the plaintiff the sum of $454,047., with legal interest thereon from date of payment, for expenses, wages, fees, travel, electricity and interest, and

such additional sums in the future as the evidence shall show, as aforesaid.

(b) That it recover of the plaintiff the sum of $1,133-479., with legal interest thereon from date of payment, for lost payments of minimum royalties, and such additional sums in the future as the evidence shall show, as aforesaid.

(c) That it recover of the plaintiff the sum of $625,000., with legal interest thereon from April 2, 1982, for loss of stockpiled coal, as aforesaid.

(d) That it recover of the plaintiff the sum of $1,000,-000., with legal interest thereon from date of payment, for probable loss from contingent liabilities, as aforesaid.

(e) That it recover of the plaintiff the sum of $22,500,-000., with legal interest thereon from April 2, 1982, for lost profits, as aforesaid.

(f) That the plaintiff's complaint be dismissed and nothing recovered thereby or these proceedings stayed, in accordance with its answer aforesaid.

(g) For its attorney fees and costs herein expended and all proper relief.

The defendant demands a jury trial of all issues triable by a jury.

Polly, Craft, Asher & Smallwood
(s) Ronald G. Polly
Ronald G. Polly
Gene Smallwood, Jr.
P. O. Box 786
Whitesburg, Kentucky 41858
606/633/4469

Cook & Wright
(s) Forrest E. Cook
Forrest E. Cook
P. O. Box 909
Whitesburg, Kentucky 41858
606/633/9351

Attorneys for Defendant

(Certificate of Service omitted in printing.)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 83-119

ROBERTS & SCHAEFER COMPANY,
a Delaware corporation, - - - - *Plaintiff,*

v.

LAKE COAL COMPANY, INC.,
a Kentucky corporation, - - - *Defendant.*

RESPONSE TO MOTION TO DISMISS OR STAY

Filed May 6, 1983

The Plaintiff, for response to the Motion of Defendant to Dismiss or Stay this proceeding, says that by Act of Congress (Title 28 U.S. Code, §1332) this Plaintiff is entitled as a matter of right to invoke federal jurisdiction as it has done in this instance. This motion is without merit and should be denied. A more specific and detailed explanation of Plaintiff's position follows.

1. *The Factual Background.*

On September 14, 1981, the parties to this action entered into a contract by the terms of which Roberts & Schaefer Company (called "Roberts & Schaefer") agreed to design and construct a coal preparation facility for Lake Coal Company (called "Lake"). The plant was designed and constructed on the property of Lake Coal Company at Roxana in Letcher County, Kentucky. Lake paid a substantial portion of the contract price, but still owes $1,-

397,615.96 according to Roberts & Schaefer. On the other hand, Lake claims that the facility was not properly designed and constructed by Roberts & Schaefer, Lake owes nothing and Lake claims additional damages for breach of contract.

(a) The State Court Action.

After the dispute arose, Lake filed a Complaint on November 12, 1982 in the Letcher Circuit Court, against Roberts & Schaefer and two of its contractors (with whom Lake had no privity of contract). The sole purpose in naming the two subcontractors, which were Kentucky corporations, was to deprive Roberts & Schaefer of a federal forum by destroying diversity of citizenship, Lake being a Kentucky corporation. Roberts & Schaefer removed, asserting that the claim against the subcontractors was a sham, but this Court remanded on the sole ground of lack of diversity. The Remand Order was entered February 15, 1983, and the case was remanded to the Letcher Circuit Court, where it now reposes. The record in the Letcher Circuit Court remains the same as at remand: The Complaint, Answer and Counterclaim and Reply (see the record in Civil Action No. 82-434 in this Court). The only proceeding since remand was the service by Roberts & Schaefer in the state court proceedings of the identical First Set of Interrogatories and First Request for Production of Documents as served in this Court.

The parties are initiating discovery by deposition in June on dates which have been agreed between counsel, the depositions to be taken in both the state and federal cases.

(b) The Instant Action.

This action was commenced April 6, 1983 (shortly after remand) in the United States District Court at Pikeville

by Roberts & Schaefer, a Delaware corporation with its principal place of business in Illinois, against Lake, a Kentucky corporation with its principal place of business in Kentucky. Pure diversity jurisdiction exists.

The thrust of the instant action is to recover the balance of the monies due on the contract and to assert a Mechanic's and Materialman's Lien filed on the property of Lake pursuant to Kentucky statutes.

Lake answered and counterclaimed, denying any monies due, claiming Roberts & Schaefer breached the contract by improperly designing and constructing the coal preparation facility, and seeking damages. Roberts & Schaefer denies the counterclaim by reply.

(c) The Comparative Status of the Proceedings.

The proceedings in both the state and federal courts are at the same stage. The pleadings are made up in both cases. Roberts & Schaefer has initiated discovery through the service of interrogatories and requests to produce. Both Roberts & Schaefer and Lake will commence discovery in both actions by deposition during the month of June. Both actions are in their early discovery stages.

(d) The Existence of an Important State Interest.

This is an action wherein this Court has jurisdiction based solely on diversity of citizenship. It does not involve any state-federal relations. No state court has taken possession of any res, and the concurrent progress of this action will not impede or affect the state court action. There is no countervailing state interest.

2. *Memorandum of Authorities*

(a) The Right to a Federal Forum.

Roberts & Schaefer, an Illinois corporation, is expressly granted a federal forum in an action against a Kentucky citizen by the Congress of the United States under Title 28, U. S. Code, §1332(a)(1) and (c). The right to a federal forum is not to be taken lightly or summarily dismissed. *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U. S. 336, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976).

In *Moses H. Cone Hospital* v. *Mercury Constr.,* ___ U. S. ____, 103 S. Ct. ____, 74 L. Ed. 2d 765 (decided February 23, 1983), the Supreme Court of the United States had before it the review of a stay order entered by a District Court, which had been overturned by the Circuit Court of Appeals. The Supreme Court granted certiorari and stated the issue in this fashion at 74 L. Ed. 2d 778:

> We now turn to the principal issue to be addressed, namely the propriety of the District Court's decision to stay this federal suit out of deference to the parallel litigation brought in state court. Colorado River Water Conservation District v. United States, 424 U. S. 800, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976), provides persuasive guidance in deciding this question.

The duty of the federal court to exercise the jurisdiction conferred upon it by the Congress is dealt with by the Supreme Court in *Moses H. Cone Hospital* through the following comments on the *Colorado River* decision, at 74 L. Ed. 2d 779:

> We noted that " 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction,' " and

that the federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them" We continued:

> 'Given this obligation, and the absence of weightier considerations of constitutional adjudication and state-federal relations, the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention. The former circumstances, though exceptional, do nevertheless exist.' *Id.,* at 818, 47 L. Ed. 2d 483, 96 S. Ct. 1236.

We declined to prescribe a hard and fast rule for dismissals of this type, but instead described some of the factors relevant to the decision.

And in *Moses H. Cone Hospital* the Court went on to deal with the "absention" doctrine, again construing *Colorado River* in this language at 74 L. Ed. 2d 779:

> We began our analysis by examining the absention doctrine in its various forms. We noted:
>
> > 'Abstention from the exercise of federal jurisdiction is the exception, not the rule. The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest.'
>
> After canvassing the three categories of absention, we concluded that none of them applied to the case at hand. 424 U. S. at 813-817, 47 L. Ed. 2d 483, 96 S. Ct. 1236.

In *Moses H. Cone Hospital* the state court action was commenced some nineteen days before the federal action. The hospital argued that the prior filing gave the state court priority. In response to that, the Supreme Court said at 74 L. Ed. 2d 783:

> That aside, the Hospital's priority argument gives too mechanical a reading to the "priority" element of the Colorado River balance. This factor, as with the other Colorado River factors, is to be applied in a pragmatic, flexible manner with a view to the realities of the case at hand. Thus, priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions.

The Court will readily observe that here both the federal action and the state action have reached approximately the same point procedurally and there is no just reason to prefer the state court action.

In *Moses H. Cone Hospital,* the Supreme Court of the United States mandated the "virtually unflagging obligation" of the federal courts to exercise jurisdiction and dissolved the District Court stay.

(b) The Parties to this Action.

Lake suggests the federal action be stayed because the two contractors are parties in the state court and not here.

But we have pointed out that Lake made them parties in the state court as diversity destroyers and not because they were necessary or even proper. The contract was between Lake and Roberts & Schaefer alone, and Lake had no contractual connection, or privity, with the contractors.

The "defect of parties" claim simply doesn't exist in fact. The contractors are not parties to the contract sued on. But even if they were, they are not necessary parties. By express statute, Roberts & Schaefer has the option to sue Lake alone. KRS 411.180 provides:

> If two or more persons be jointly bound by contract, the action thereon may be brought against all or any of them, at the plaintiff's option.

The "defect of parties" issue is without substance, injected to detract from the right to the federal forum granted by Congress. The claimed defect should be rejected.

(c) The Request for a Stay.

Lake may well say to this Court in the alternative a stay should be granted even if dismissal is improper. But the practical effect of a stay is a dismissal. The Supreme Court made this plain in *Moses H. Cone Hospital, supra,* at 74 L. Ed. 2d 776, in this language:

> Hence, a stay of the federal suit pending resolution of the state suit meant that there would be no further litigation in the federal forum; the state court's judgment on the issue would be res judicata. Thus, here, even more surely than in Idlewild, Mercury was 'effectively out of the court.' Hence, as the Court of Appeals held, this stay order amounts to a dismissal of the suit.

(d) Dismissal is Improper.

The right to a federal forum where expressly granted by Congress must prevail over a prior state action. Otherwise, the will of Congress would become a nullity. And it could be thwarted by the filing of the first action in state court including as defendants selected parties to destroy diversity. In reality, the battle here is between Roberts & Schaefer on the one hand and Lake on the other, citizens of different states. It is a contest which qualifies for a federal forum, and this Court should not deprive them of that forum.

This question has come before other judges in the Eastern District of Kentucky. For example, in *Ralph Mullins, et al.* v. *Brushy Creek Coal Company, et al.,* Civil No. 77-14, United States District Court at Catlettsburg, Mullins and the other plaintiffs had previously commenced an action in the Elliott Circuit Court claiming wrongful mining of their coal. They later commenced the above diversity action in the United States District Court at Catlettsburg making the same claim. The defendants, one of which was represented by the undersigned, moved to dismiss on the ground that there was an identical prior action pending in the state court filed by the same plaintiffs. Judge Hermansdorfer denied the motion, rejecting our position in this language:

> Defendants' second ground for dismissal, the pendency of the same action between the same parties in a state court, is, without more, without merit. Plaintiffs' action does not fit within the category of cases over which federal courts traditionally decline to exercise diversity jurisdiction in deference to state courts, such as probate and domestic relations cases. See 13

Wright, Miller, & Cooper, *Federal Practice and Procedure,* §3609. As a general rule, the mere fact that the same case is also pending in state court is no ground for dismissal, unless the case fits within the class of cases to which the equitable doctrine of federal court abstention applied. *Colorado River Water Conservation District* v. *United States,* 424 U. S. 800, 813-819 (1976). Defendants' 'multiplicity of actions' argument simply does not remove this action from the confines of the general rule, and therefore, dismissal on this basis is also unwarranted. See *Carr* v. *Grace,* 516 F. 2d 502, 503 (5th Cir. 1975).

Accordingly, It Is Ordered And Adjudged Herein As Follows:

(1) That the motion of defendant Brushy Creek Coal Company to dismiss be, and the same hereby is, Overruled.

(2) That the motion to dismiss made by defendants James R. Lewis and Pauline Lewis be, and the same hereby is, Overruled.

(3) That the motion to dismiss made by defendant Addington Brothers Trucking, Inc., be, and the same hereby is, Overruled.

(4) That the motion to dismiss made by defendant Addington Brothers Mining, Inc. be, and the same hereby is, Overruled.

This the *23* day of May, 1977.

H. David Hermansdorfer

Judge

(Filed May 23, 1977)

Further argument would be useless. It is now clear this is simply a diversity action where the Plaintiff is congressionally granted right to a federal forum. That right should not be denied.

3. *Defendant's Authorities.*

In *Colorado River,* at 424 U. S. 814 - 817, and 47 L. Ed. 2d 496 - 498, the three areas justifying federal abstention in deference to state court actions are described. They are (1) where state court construction of a state law may render a federal constitutional question moot, (2) where the action involves difficult questions of state law "on policy problems of substantial public import whose importance transcends the result in the case at bar", and (3) where federal jurisdiction has been invoked to restrain state proceedings. None apply here.

The authorities cited by Defendant are generally abstention-related cases. In the light of *Moses H. Cone Hospital* (1983) and *Colorado River* (1976), these older District Court cases are neither indicative of the present state of the law nor persuasive, but they may be explained as inapplicable here. We do so.

(a) *Gillis* v. *Keystone Mut. Casualty Co.,* 172 F. 2d 826 (6th Cir. 1949). There a state court receiver of insolvent Keystone had been appointed. Federal jurisdiction was invoked to oust the state court receiver. The abstention doctrine was applied.

(b) *Bowles* v. *Lee,* 59 F. Supp. 639 (E. D. Ky. 1945). Federal jurisdiction was invoked to enjoin an ejectment proceeding in the state court. The injunction was denied.

(c) *Mitter* v. *Massa,* 237 F. Supp. 915 (S. D. N. Y. 1965). A stay was granted where preliminary injunc-

tion was sought in federal court when the matter was ripe for decision in the state court.

(d) *Hearing Aid Ass'n. of Kentucky, Inc.* v. *Bullock,* 413 F. Supp. 1032 (E. D. Ky. 1976). Action to enjoin the Attorney General of Kentucky from prosecution state court actions authorized by Kentucky law to prohibit illegal sale of hearing aids. The doctrine of abstention was applied.

(e) *Greer* v. *Searce,* 53 F. Supp. 807 (W. D. Mo. 1944). A declaratory judgment action involving title to land. All interested parties were joined in the state court action. All were not joined in federal court. Under the state of the records in both cases the court refused to dismiss but did stay.

(f) *Massachusetts* v. *Missouri,* 308 U. S. 1, ____ S. Ct. ____, 84 L. Ed. 3 (1939). Massachusetts sought to invoke original jurisdiction of the Supreme Court. The United States District Court for Missouri had jurisdiction. The Supreme Court declined to accept jurisdiction. The states were not the real parties in interest, and the real parties in interest had an adequate forum in the District Court.

(g) *P. Biersdorph & Co.* v. *Duke Laboratories,* 92 F. Supp. 287 (S. D. N. Y. 1950). The state court action had been tried and was on appeal. The federal action for trademark infringement was stayed.

(h) *Reiter* v. *Universal Marion Corporation,* 173 F. Supp. 13 (D. C. 1959). The state court suit was ready for judgment. Parties in the federal court were incomplete. The federal proceeding was stayed.

(i) *Maternally Yours* v. *Your Maternity Shop,* 89 F. 2d 167 (S. D. N. Y. 1950). Trademark infringement case. Plaintiff filed suit first in state court and later

in federal court. Held - federal action will be stayed unless Plaintiff agreed not to prosecute state court case.

(j) *Vanderwater* v. *City Nat'l. Bank of Kankakee, Ill.,* 28 F. Supp. 89 (E. D. Ill. 1939). Federal jurisdiction was invoked to surcharge an accounting in a probate matter pending in state court. Abstention was decreed.

(k) *Klanian* v. *New York Life Ins. Co.,* 39 F. Supp. 777 (D. R. I. 1941). State court action had been tried and appealed. The federal court stayed.

(l) *Brendle* v. *Smith,* 46 F. Supp. 522 (S. D. N. Y. 1942). A stay was granted under the peculiar facts, including the involvement of the defendant in the war effort (World War II).

We do not suggest defendants authorities are trite or valueless. We could have cited many more cases with tones more pleasing to our ears. But the law announced by the Supreme Court in this area is so new and clear we would do this court a disservice by hunting and picking favorable cases, burdening the court with sheer bulk rather than controlling authority. We submit that *Moses H. Cone Hospital,* and *Colorado River,* are decisive.

CONCLUSION

The motion of the Defendant for dismissal or stay should be denied.

(s) C. Kilmer Combs
C. Kilmer Combs
Wyatt, Tarrant & Combs
1100 Kincaid Towers
Lexington, Kentucky 40507
(606) 233-2012

Response to Motion to Dismiss or Stay—Filed May 6, 1983

(s) K. Gregory Haynes (CKC)
K. Gregory Haynes
Wyatt, Tarrant & Combs
2600 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

Affiant, C. KILMER COMBS, says he is one of the attorneys for the Plaintiff and that the factual statements contained in the foregoing Response relating to the status of both the federal action and the state court action are true.

(s) C. Kilmer Combs
C. Kilmer Combs

STATE OF KENTUCKY }
COUNTY OF FAYETTE }

Subscribed and sworn to before me by C. Kilmer Combs, this 5th day of May, 1983.

My Commission Expires: October 5, 1986.

(s) Juanita M. Wheeler
Notary Public, State at Large
Kentucky

(Certificate of Service omitted in printing.)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 83-119

ROBERTS & SCHAEFER COMPANY, - - - *Plaintiff,*

v.

LAKE COAL COMPANY, INC., - - - *Defendant.*

REPLY MEMORANDUM FOR DEFENDANT

Filed May 16, 1983

DISMISSAL IS PROPER

The plaintiff's response asks this court to deny the defendant's motion to dismiss or stay for the sole reason that it has a right to a federal forum for its cause of action. It reasons that "the right to a federal forum where expressly granted by Congress must prevail over a state action, otherwise the law of Congress would become a nullity." Contrary to the plaintiff's allegations, 28 U.S.C. 1332 grants only a "statutory *privilege* of access to a federal court *which is not absolute*". *P. Beiersdorf & Company, Inc.* v. *Duke Laboratories,* 92 F. Supp. 287 (S.D. N.Y., 1950). As stated by the Supreme Court in *Brillhart* v. *Excess Insurance Company,* 316 U. S. 486, 494 (1942), although the district court may have jurisdiction of the action, it is "under no compulsion to exercise that jurisdiction". This is particularly true where a parallel action has been previously filed in state court involving the same parties and issues. *Will* v. *Calvert Fire Insurance Company,* 437 U. S. 660 (1978). The law is clear that the dis-

trict court has the power to dismiss or stay proceedings pending adjudication of a parallel action in state court as an exercise of its inherent power to control the disposition of the cases on its docket with economy of time and effort for the court, for counsel and for the litigants. *Landis* v. *North American Company,* 399 U. S. 248 (1936). The decision of whether to defer this action to the concurrent jurisdiction of the state court is, in the last analysis, a matter committed to this court's sound discretion. *Will* v. *Calvert Fire Insurance Company, supra.* In *Brillhart* v. *Excess Insurance Company, supra,* Mr. Justice Felix Frankfurter, writing for the majority, stated;

> "Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a . . . suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided." at p. 495.

Under the application of the cases cited in its memorandum, and for the reasons stated therein, the defendant submits that the warning of Mr. Justice Frankfurter to avoid gratuitous interference with the concurrent state action should be heeded by this honorable court and the defendant's motion to dismiss or stay be granted.

Thermtron Products, Inc. v. *Hermansdorfer,* 423 U. S. 336 (1975), cited by the plaintiff in support of its argument, is inapplicable. Therein, the issue raised in the Supreme Court was whether the district court could remand an action to state court for grounds other than as provided in 28 U.S.C. 1446, 1447. The question of remand has been properly disposed of in the present action.

RECENT SUPREME COURT DECISIONS

Recent Supreme Court cases, including those cited by the plaintiff, demonstrate that under the circumstances herein presented, the federal action should be dismissed or stayed pending adjudication of the same action in the state court.

In *Colorado River Water Conservation District* v. *United States, supra,* the United States filed an action in federal court against some 1,000 water users seeking adjudication of reserved water rights. One defendant, thereafter, brought suit in state court for purposes of adjudicating all of the government's claims which were also raised in the federal action. On motion of the defendant water user, the federal court dismissed its action pending adjudication of the state proceeding. The court of appeals reversed the action of the district court. On certiorari, the Supreme Court reversed the court of appeals and affirmed the judgment of the district court. Although the Court found that the case did not fall within any of the classic abstention categories, it nevertheless affirmed the dismissal of the federal action on principles which "rest on considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." The three factors considered by the court therein were, 1) the inconvenience of the federal forum; 2) the desirability of avoiding piece-meal litigation; and 3) the order in which jurisdiction was obtained by the concurrent forums.

In discussing this case the plaintiff in its response seizes upon the language of the court regarding its "unflagging obligation" to exercise jurisdiction but ignores the fact that the Court *upheld the correctness of the district court's final decision to dismiss* because of concurrent jurisdiction. The

plaintiff makes the same error in application of *Colorado River Water Conservation District, supra,* to the facts herein presented that the court of appeals made in *Will* v. *Calvert Fire Insurance Company, supra.*

In that case, Calvert advised American Mutual Insurance Company (American) that it was rescinding its membership in a reinsurance pool American operated. American filed an action in state court to declare the agreement with Calvert in full force and effect. Calvert answered and affirmatively plead that American had violated the Securities Act of 1932, Rule 10-b5 of the Security Exchange Act of 1934, and Illinois Securities Act and counterclaimed for damages on all defenses claimed except the claim involving violation of Rule 10-b5 which was exclusively within the jurisdiction of the federal courts. Calvert also filed an action in federal court for damages, for the Rule 10-b5 violation and joined therewith claims based on each of the other defenses raised in the state action. Upon motion of American, the district court granted a stay of the federal action because of the pending parallel state action. The court of appeals entered a mandamus order directing the judge to proceed immediately with Calvert's claim for damages based upon the language of *Colorado River Water Conservation District, supra,* as aforestated. On certiorari, the Supreme Court reversed the court of appeals and affirmed the district court's stay order. Applying *Brillhart* v. *Excess Insurance Company, supra,* the court held that;

> . . . "a district court's decision to defer proceedings because of the concurrent state litigation is generally committed to the discretion of that court. No one can seriously contend that a busy federal trial judge, confronted both with competing demands on his time for

> matters properly within his jurisdiction and with inevitable scheduling difficulties because of the unavailability of lawyers, parties and witnesses is not entrusted with a wide latitude in setting his own calendar." at p. 665.

It is not surprising that the plaintiff failed to cite *Will* v. *Calvert Fire Insurance Company, supra,* in its discussion of recent Supreme Court decisions. These cases clearly demonstrate that this Court can dismiss this action in deference to the state action.

In *Moses H. Cone Hospital* v. *Mercury Construction Corporation, supra,* the Supreme Court affirmed the court of appeals' reversal of a stay order because it found that the defendant had made no showing of circumstances to justify the stay of the federal action.

Although the court reversed the stay order, the defendant submits that a careful analysis of *Moses H. Cone Hospital, supra,* indicates that the present action should be dismissed or stayed because the critical facts not present in *Moses H. Cone Hospital, supra,* which lead to the reversal of the stay order, are present in the case at bar.

First, the Court in *Moses H. Cone Hospital, supra,* noted that there was no contention that the federal forum was any less convenient to the parties than the state forum. Herein, because of the nature of the suit, and because the distance to federal court from the facility negligently designed, constructed and installed by the plaintiff is more than twice the distance to the situs of the state court, the federal forum is less convenient.

Secondly, and more importantly, the Court in *Moses H. Cone Hospital, supra,* found that the concurrent federal action did not cause a piece-meal resolution of parties' underlying disputes. Because all the parties before the

state court are not present in the federal action, herein, a piece-meal resolution of the issues raised concurrently in the federal and state action will be necessary unless this action is dismissed or stayed pending adjudication of the more inclusive state action.

Thirdly, in *Moses H. Cone Hospital, supra,* the Court found that although the state action was first filed, the parties, in the federal action had taken most of the steps necessary to resolve the issue therein presented whereas there were no substantive proceedings in the state action. As the plaintiff is quick to point out to this court, the federal action has proceeded no further towards resolution than the state action. The defendant submits that the reason that the state action has not proceeded further is due to the actions on the part of the plaintiff in wrongfully removing the action from state court. Moreover, the defendant would ask the court to take note that the plaintiff propounded interrogatories in the federal action with the complaint so as to put itself in a posture to argue that the progress of the concurrent actions were similar. The fact is that the action was filed in state court some four months prior to the institution of the federal action and the state court should hold jurisdiction of the cause of action to the exclusion of the federal court until the state court's duty is fully performed and the jurisdiction involved is exhausted. *Callis* v. *Keystone Mutual Casualty Company,* 172 F. 2d 826 (6th Cir., 1949). See also, *Bowles* v. *Lee,* 59 F. Supp. 639 (D. C. Ky. 1945).

Fourthly, *Moses H. Cone Hospital, supra,* dealt with issues of federal law and federal policy. As the Court noted, "the presence of federal law issues must always be a major consideration weighing against surrender of the action" to the state court. As the defendant pointed out in its motion, there are no federal issues presented which

require the particular expertise of the district court. Rather, this is an action based upon diversity jurisdiction which requires this court to apply state law in the resolution of all substantive issues. See, *Will* v. *Calvert Fire Insurance Company, supra.*

Lastly, the Court in *Moses H. Cone Hospital, supra,* found that the state proceeding was inadequate to protect the rights of the plaintiffs in the federal action. There is no indication that the rights of the plaintiff herein will not be adequately protected in the state action. See, *Brendle* v. *Smith,* 46 F. Supp. 522 (S. D., N. Y. 1942). The Supreme Court stated that it reversed the stay order because there was a substantial doubt that the state court litigation would be an adequate vehicle for the complete and prompt resolution of the issues between the parties. In the present action no question is raised to even indicate that the state court litigation would be an inadequate vehicle for the complete and prompt resolution of the issues between the parties. The only contention raised by the plaintiff is that it should be allowed to proceed in the forum of its choice based upon a right which does not exist.

The defendant submits that because this court is already heavily burdened with litigation with which it must, of necessity deal, it should not be called upon to duplicate the state court's work in cases involving the same issues and same parties. *Reider* v. *Universal Marion Corp.,* 173 F. Supp. 13 (D. C. D. C. 1959). The defendant should not be harrassed and vexed with two actions pending in two separate courts over the same subject matter. *Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.,* 89 F. Supp. 167 (D. C. N. Y. 1950). Nor, should this defendant be subjected to the costs and expense of two different courts deciding the same issue based on state law in an action between the same parties. *Vanderwater* v. *City National Bank,* 28 F.

Supp. 89 (D. C. Ill. 1939). The defendant submits that this court should heed Mr. Justice Frankfurter's warning against gratuitous interference with the orderly and comprehensive disposition of the state court litigation and this action should be dismissed or stayed.

APPROACH OF FEDERAL DISTRICT COURTS IN KENTUCKY

In *Hearing Aid Association of Kentucky* v. *Bullock,* 413 F. Supp. 1032 (D. C. Ky. 1976), Judge Siler dismissed a concurrent federal action in deference to the state action which involved the same issues and parties. The court cited, with approval, the reasoning of the Supreme Court in *Taylor* v. *Tainter,* 83 U. S. 366, 370 (1882), which stated;

> "Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is fully exhausted; and this rule applies alike in both civil and criminal cases."

Similarly, the Supreme Court's decision in *Colorado River Water Conservation District, supra,* demonstrates that a dismissal of the federal action in deference to the state action, under the circumstances herein presented, is proper.

On the other hand, the plaintiff cites to this court, as authority for its argument, an unpublished opinion of Judge Hermansdorfer. Even the plaintiff's counsel knows that an unpublished opinion is neither authoritative nor persuasive. The defendant submits that the opinion of Judge Siler, which is in keeping with the most recent Supreme Court cases, as previously discussed, properly re-

flects the approach applied by the district courts in Kentucky. *Hearing Aid Association of Kentucky, supra,* is both authoritative and persuasive.

Therefore, the defendant respectfully submits that the complaint herein should be dismissed or stayed pending disposition of the state action between the same parties and presenting the same issues.

Respectfully submitted,

Polly, Craft, Asher & Smallwood
(s) Ronald G. Polly
Ronald G. Polly
Gene Smallwood, Jr.
P. O. Box 786
Whitesburg, Kentucky 41858
606-633-4469

Cook & Wright
(s) Forrest E. Cook
Forrest E. Cook
P. O. Box 909
Whitesburg, Kentucky 41858
606-633-9351

(Certificate of Service omitted in printing.)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 83-119

ROBERTS & SCHAEFER COMPANY - - - *Plaintiff*

v.

LAKE COAL COMPANY, INC. - - - *Defendant*

RESPONSE TO DEFENDANT'S REPLY MEMORADUM—Filed May 19, 1983

We respond solely to preclude misconception.

Defendant cites *Brillhart* v. *Excess Ins. Co. of America,* 316 U. S. 491, 62 S. Ct. 1173, 86 L. Ed. 1620 (1942) as holding a district court is "under no compulsion to exercise (its) jurisdiction."

A careful reading of the case discloses the issue to be whether a district court has a discretion to entertain a declaratory judgment action under 28 USC §2201. The statute says the court "may declare the rights" and the Supreme Court held that is discretionary.

Declaratory judgment deals with the remedy, and not jurisdiction. It is not relevant here.

Otherwise there is nothing new in the Reply.

Response to Defendant's Reply Memorandum

(s) C. Kilmer Combs
C. Kilmer Combs
Wyatt, Tarrant & Combs
1100 Kincaid Towers
Lexington, Kentucky 40507
(606) 233-2012

(s) K. Gregory Haynes
K. Gregory Haynes
Wyatt, Tarrant & Combs
2600 Ciizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

Attorneys for Plaintiff

(Certificate of Service omitted in printing.)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 83-119

ROBERTS & SCHAEFER COMPANY - - - *Plaintiff*

v.

LAKE COAL COMPANY, INC. - - - *Defendant*

SUPPLEMENTAL MEMORANDUM OF PLAINTIFF

Filed May 25, 1983

Defendant suggests that plaintiff is trying to ignore the case of *Will* v. *Calvert Fire Insurance Co.*, 437 U. S. 655, 98 S. Ct. 2552, 57 L. Ed. 2d 504 (1978). Not so, and we felt that the Court would agree that it does not apply from a casual reading of the Opinion.

In *Will*, the issue before the Supreme Court was the propriety of granting a writ of mandamus against Judge Will, the District Judge who had stayed the federal proceeding. The Supreme Court stated the issue this way at 437 U. S. 657, 658:

> "We granted certiorari to consider the propriety of the use of mandamus to review a District Court's decision to defer two concurrent state proceedings, and we now reverse."

The Supreme Court reversed the writ of mandamus issued by the Circuit Court of Appeals and pointed out the distinction between a mandamus proceeding, such as *Will*, and appeals in the ordinary course such as *Moses H. Cone Hospital* (1983) and *Colorado River* (1976). Since this is

not a mandamus proceeding, we found no relevancy in *Will* v. *Calvert Fire Insurance Co., supra.*

We do not want the last word, but we believe and hope that everyone has had their say. We leave the matter with the Court's good judgment.

(s) C. Kilmer Combs
C. Kilmer Combs
Wyatt, Tarrant & Combs
1100 Kincaid Towers
Lexington, Kentucky 40507
(606) 233-2012

(s) K. Gregory Haynes
K. Gregory Haynes
Wyatt, Tarrant & Combs
2600 Citizens Plaza
Louisville, Kentucky 40202
(502) 584-1144

Attorneys for Plaintiff

(Certificate of Service omitted in printing.)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 83-119

ROBERTS & SCHAEFER COMPANY, - - - *Plaintiff,*

v.

LAKE COAL COMPANY, INC., - - - *Defendant.*

ORDER—Filed July 15, 1983

The defendant has moved the Court to dismiss or stay this action pending resolution of an action involving the same issues and the same parties, et al., in Letcher Circuit Court (Civil Action No. 82-CI-414). The Court has considered the parties' responses and replies to responses to defendant's motion herein and is of the opinion that no good cause has been shown to justfy litigating these same issues simultaneously in two different judicial systems. The Court being so advised,

IT IS HEREBY ORDERED, that in the interests of fairness to all parties concerned, as well as to avoid multiplicity of judicial time and effort and piece-meal litigation, this action is now STAYED pending the final adjudication of the aforementioned state action in Letcher Circuit Court.

This the 14th day of July, 1983.

(s) G. Wix Unthank
G. Wix Unthank, Judge

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Case No. 83-5551

ROBERTS & SCHAEFER COMPANY, - *Plaintiff-Appellant*

v.

LAKE COAL COMPANY, INC., - - *Defendant-Appellee*

APPELLANT'S MOTION FOR SUMMARY REVERSAL, OR FOR ADVANCEMENT

Filed Sept. 9, 1983

The Appellant, Roberts & Schaefer Company (called "R&S"), respectively moves the Court:

1. To summarily vacate the order staying these proceedings, and remand forthwith for further proceedings, because clear error was committed under the recent decision of the Supreme Court of the United States in *Moses H. Cone Hospital* v. *Mercury Const.*, ____ U. S. ____, 103 S. Ct. ____, 74 L. Ed. 2d 765 (February 23, 1983); or in the alternative.

2. To advance this cause for oral argument and submission at the earliest convenience of the court. This motion is made under Rule 9(d)(4) of this Court. The grounds for this motion are more particularly set forth below.

THE DISPUTE

Lake Coal Company (called "Lake") is a Kentucky corporation with substantial coal mining operations in

Letcher County, Kentucky. On September 14, 1981, R&S, a Delaware corporation headquartered in Chicago, entered into a written contract with Lake to construct a coal washing plant in Letcher County, Kentucky for a contract price of $4,228,000.

The plant was constructed. During construction problems were encountered, each party blaming the other. R&S claims it completed construction per the contract, and therefore says it is entitled to the balance of the contract Price. Lake asserts the plant was defectively designed and built and has not been completed, and therefore denies R&S is entitled to payment and further asserts it is entitled to damages in excess of $25 million for breach of contract.

THE LITIGATION

On November 12, 1982, Lake filed a state court action in the Letcher Circuit Court, naming R&S and two subcontractor Kentucky corporations as defendants seeking over $25 million for breach of contract [A. 296]. Lake had no contractual connection with the subcontractors. R&S removed, asserting in its petition for removal that no claim of substance was made against the two Kentucky defendants and their presence was a sham to prevent removal [A. 314]. R&S answered, counterclaiming for the balance of the contract price due [A. 321]. Lake moved to remand [A. 334]. R&S responded [A. 367]. On February 15, 1983, the District Court remanded [A. 379].

R&S, desiring a federal forum, instituted this diversity action in the United States District Court for the Eastern District of Kentucky on April 6, 1983, seeking recovery of the balance of the contract price and asserting a materialman's lien on the coal processing plant [A. 3]. Lake

filed its answer and counterclaim for breach of contract [A. 220]. The issues were completed by reply [A. 250].

Lake moved to stay the federal action until final adjudication of the remanded state action, citing the presence of the state court action involving the same parties and issues as the sole basis for a stay [A. 238]. More specifically, Lake relied on [1] prior filing in the state court, and [2] duplication of effort with inherent waste.

R&S responded [A. 250] by demonstrating that the state court action is *in personam* and has not proceeded any further than the federal action. The status of the state action is the same as the federal action [A. 256, 257]. Procedurally speaking, both cases have progressed equally far and are in the early discovery stage.

R&S asserted below that it was entitled to a federal forum under Article III, §2 of the United States Constitution and 28 U.S.C. §1332. Its position was that the United States District Court, having diversity jurisdiction, was under a Congressionally and Constitutionally imposed duty to proceed. *Thermitron Products, Inc.* v. *Hermansdorfer,* 423 U. S. 336, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976); *Moses H. Cone Hospital* v. *Mercury Const.,* ____ U. S. ____, 103 S. Ct. ____, 74 L. Ed. 2d 765 (1983).

More specifically R&S pointed out that

[1] Both actions were at the same (early discovery) stage.

[2] The state court action was *in personam,* with no *res* involved.

[3] No federal-state relations requiring abstention were involved.

[4] No reasons of wise judicial administration existed to prefer the state forum over the federal forum.

[5] Retreat by the federal judiciary was unwarranted [A. 250-267].

By order entered July 15, 1983, the federal action was "stayed pending the final adjudication of the aforementioned state court action" [A. 294]. R&S, deprived of a federal forum, appeals (such orders expressly held to be appealable in *Moses H. Cone Hospital*). The stay order appealed from reads:

> The defendant has moved the Court to dismiss or stay this action pending resolution of an action involving the same issues and the same parties, *et al.*, in Letcher Circuit Court (Civil Action No. 82-CI-414). The Court has considered the parties' responses and replies to responses to defendant's motion herein and is of the opinion that no good cause has been shown to justify litigating these same issues simultaneously in two different judicial systems. The Court being so advised,
>
> It Is Hereby Ordered, that in the interest of fairness to all parties concerned, as well as to avoid multiplicity of judicial time and effort and piece-meal litigation, this action is now Stayed pending the final adjudication of the aforementioned state action in Letcher Circuit Court [A. 294].

THE CLEAR ERROR

The clear error of the District Court was in refusing to exercise the "virtually unflagging obligation" to proceed as spelled out in *Moses H. Cone Hospital, supra.*

Everyone agrees no state-federal relations are involved. No reasons for abstention exist. The record discloses two actions, one state and one federal, involving the same

parties and the same claims at the same stage in the respective proceedings. The District Court had before it the classic concurrent jurisdiction issue. The Supreme Court pointed out in *Moses H. Cone Hospital, supra,* and in *Colorado River Water Conservation District* v. *United States,* 424 U. S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976), that stay of a federal action for reasons of wise judicial administration will be warranted only when clearly justified. With no justifying circumstances here, the stay was clear error.

The stay order shows the District Court imposed on R&S the burden of justifying "litigating these same issues simultaneously in two different judicial systems." The District Court held that "no good cause has been shown to justify" concurrent jurisdiction, and stayed the federal action.

We assert clear error in requiring R&S, having a right to a federal forum, to justify its exercise of that right. Instead, the heavy burden of showing that wise judicial administration required deprival of that right was on Lake. No showing was made. The order staying was tantamount to dismissal, was appealable and was clear error. *Moses H. Cone Hospital, supra.*

The appalling thing is that a litigant can file an action in his state court against a non-resident, join as defendants to prevent removal one or more local citizens who shouldn't be parties and deprive a citizen of another state of his federal forum by obtaining a stay when a parallel federal action is commenced. This is wrong, was condemned as wrong in *Moses H. Cone Hospital,* and the order appealed from is therefore clear error. It should be summarily vacated.

THE NEED FOR A FEDERAL FORUM

Letcher County, where the state action is pending, is an Eastern Kentucky mountain county with a population of 22,590. It is a separate state judicial district. The sole industry is coal mining and Lake is one of the largest operators in the county. Unemployment is high, about 27%, among the highest in the state. Lake, its officials, employees and attorneys wield a heavy financial and political influence in the community. The litigation tactics here were controved to confine the trial to Letcher County where R&S will be subject to the local prejudice in favor of a local industry upon which the local economy and the citizens are totally dependent. Until now, these tactics have been successful.

The Constitution and the Congress, by providing for diversity jurisdiction, did not intend the right to a federal forum to be so easily evaded. The basis for diversity jurisdiction is thus explained by Professor Moore:

> It is the generally accepted view that diversity jurisdiction was established to provide access to a competent and impartial tribunal, free from local prejudice or influence, for the determination of controversies between citizens of different states. While actual instances of state court prejudice may have been difficult to prove,
>
> It was believed that, consciously or otherwise, the courts of a state may favor their own citizens. Bias against outsiders may become embedded in a judgment of a state court and yet not be sufficiently apparent to be made the basis of a federal claim.

Chief Justice Marshall aptly commented that:

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

1 Moore's Federal Practice, §0.71(3), p. 701.20.

These considerations are particularly important to a Chicago manufacturer who contracts to perform work in Letcher County, Kentucky. From the beginning, diversity jurisdiction has been an important cog in the development of the nation through the conduct of business in the various states.

> Whether or not fully anticipated by the Founders, this fostering of investment in the emergent nation was one of the most salutory effects ascribed to diversity jurisdiction. As former President and Chief Justice Taft has stated,
>
> The material question is not so much whether the justice administered is actually impartial and fair, as it is whether it is thought to be so by those who are considering the wisdom of investing their capital in states where that capital is needed for the promotion of enterprises and industrial and commercial progress.

1 Moore's Federal Practice, §0.71(3), p. 701.23.

And so here, R&S seeks diversity jurisdiction to protect its interest in this interstate endeavor from the local

prejudices it will certainly encounter in Letcher Circuit Court.

THE URGENCY

When Judge Unthank's order was entered, the state and federal cases were even procedurally. The stay in federal court enables the state court to proceed to judgment while this appeal is pending. Unless expedited, R&S will be deprived of not only a federal forum but also the right of meaningful appeal. The practical effect of the stay is forcefully stated in *Moses H. Cone Hospital,* at 74 L. Ed. 2d 776:

> Hence, a stay of the federal suit pending resolution of the state suit meant that there would be no further litigation in the federal forum; the state court's judgment on the issue would be *res judicata.* Thus, here, even more surely than in Idlewild, Mercury was 'effectively out of court.' Hence, as the Court of Appeals held, this stay order amounts to a dismissal of the suit.

The immediate problem of R&S is that the time consumed by the pendency of this appeal, with the stay in effect, will be fatal, even if this Court reverses one or two years hence. Delay in this Court will certainly deprive R&S of a federal forum.

THE REMEDY

Rule 9(d)(4) of this Court contemplates summary reversal where the error is clear. The error here is clear. The Rule should be applied here.

The right of R&S to a federal forum is clear, or sufficiently so that the status quo of the state and federal proceedings should be maintained pending this appeal. If

there is any reason not to grant summary reversal, the stay below should be vacated pending this appeal, so the federal action will not fall fatally behind the progress of the state action. An order of this nature is authorized by Rule 9(d)(4) and is inherent in this Court's power to protect its appellate jurisdiction. *McClellan* v. *Garland,* 217 U. S. 268, 30 S. Ct. 501, 54 L. Ed. 762 (1910).

There may be other remedies. Perhaps a status quo order during appeal directed to the parties would be more appropriate. After all, the problem was created by Lake's unwarranted motion; so, it should not be heard to complain of status quo until the problem is solved.

We urge this Court to fashion an order which will make this a meaningful appeal, placing R&S in as good position as it was in should this Court reverse.

CONCLUSION

The briefs and appendix will be filed by the time this motion is heard. If it appears R&S has or may have any right to a federal forum, this Court must either reverse summarily with direction to proceed forthwith or preserve the status quo until this Court can act. Here an appeal delayed is justice denied.

(s) Bert T. Combs
Bert T. Combs
Wyatt, Tarrant & Combs
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

Attorney for Plaintiff-Appellant

(Certificate of Service omitted in printing.)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Case No. 83-5551

ROBERTS & SCHAEFER COMPANY, - *Plaintiff-Appellant*

v.

LAKE COAL COMPANY, INC., - - *Defendant-Appellee*

RESPONSE TO APPELLANT'S MOTION FOR SUMMARY REVERSAL, OR FOR ADVANCEMENT

Filed September 19, 1983

Comes the appellee, Lake Coal Company, Inc., (Lake), and for its response to the appellant's Motion For Summary Reversal, or For Advancement, states that the Court should overrule and deny the appellant's motion because the district court's order in staying the federal action was a proper exercise of its judicial discretion, and no clear error was committed. Moreover, the appellant's actions demonstrate that there is no reason for this Court to expediate the appeal of this matter. In support of its response, the appellee relies on its memorandum set forth before.

STATEMENT OF FACTS

On September 14, 1981, the parties herein entered into a written contract for Roberts & Schaefer Company (R & S) to construct a coal washing plant for Lake in Letcher County, Kentucky. Prior to the date of contract, construction was begun on the facility by Langley & Morgan Corporation and/or Darby Construction Company,

wholly owned domestic subsidiaries of Elgin National Industries, Inc., the parent corporation of R & S. The facility was to be completed no later than April 1, 1982. However, due to the negligence on the part of Elgin National Industries, Inc. and R & S in the design of the facility and the negligence, concealment, misrepresentation or breach of duties and contract on the part of Langley & Morgan Corporation and/or Darby Construction Company, R & S and Elgin National Industries, Inc., in the construction and installation of the facility, it failed to operate, initially due to cracking and total loss of water from the large concrete static thickener for clarifying the plant water. In fact, as of this date, the facility will not operate as designed.

On November 12, 1982, Lake filed its complaint in the Letcher Circuit Court against R & S, Elgin National Industries, Inc., Langley & Morgan Corporation and Darby Construction Company, for breach of contract, negligent design, construction and installation of the facility, misrepresentation, concealment and fraud, and breach of express and implied warranties. On December 1, 1982, R & S and Elgin National Industries, Inc., filed a Petition For Removal with the United States District Court for the Eastern District of Kentucky, and the action was docketed. On December 3, 1982, R & S filed its separate answer and counterclaim in the removed action. Lake filed its reply to this counterclaim on December 23, 1982. On February 15, 1982, upon motion of Lake, the district court entered an order finding that it lacked jurisdiction to try the matter, pursuant to 28 U. S. Code §1332(a)(1)(c) and remanded the action to the Letcher Circuit Court.

Having failed in its efforts to remove this action to federal court, R & S filed a complaint in the United States District Court for the Eastern District of Kentucky. [A., p. 3]. R & S's complaint involved the same parties, de-

manded the same remedies and restated the same question presented in its counterclaim in the state court. Accompanying the complaint, R & S filed interrogatories and a request for production of documents. [A., pp. 177, 209]. These discovery documents were also filed in the state court action.

On April 29, 1983, Lake filed a motion to dismiss or stay the federal action pending adjudication of the action in the state court. [A., p. 238]. In its memorandum filed with this motion and subsequent replies filed in the district court, Lake demonstrated that the action should be dismissed or stayed pursuant to the Supreme Court's rulings in *Brillhart* v. *Excess Insurance Company,* 316 U. S. 486 (1942), *Colorado River Water Conservation* v. *United States,* 424 U. S. 800 (1976), *Will* v. *Calvert Fire Insurance Company,* 437 U. S. 660 (1978), and *Moses H. Cone Hospital* v. *Mercury Construction,* ____ U. S. ____ 74 L. Ed. 2d 765 (1983). [A., pp. 243, 271, 284]. Specifically, the appellee set forth the following factors which weighed against the district court's exercise of its jurisdiction:

1) The action was filed in the state court in excess of four months prior to the filing of the federal action.

2) The federal forum was less convenient than the state forum.

3) Deference to the state action avoided a piecemeal resolution of the issues because all the parties before the state court were not before the federal court.

4) There was no issue of federal law or federal policy in the action, which required the particular expertise of the federal court. Rather, this was an action based upon diversity jurisdiction which required the district court to apply state law in the resolution of all substantive issues.

5) The state proceeding was adequate to protect the rights of R & S.

6) It was uneconomical as well as vexatious for the district court to proceed where the same issues, not governed by federal law, between the same parties were concurrently presented in a state court.

In response R & S argued, as it does before this court, that it had an absolute right to a federal forum for its cause of action. [A., pp. 254, 282, 289]. After much briefing by both parties, on July 15, 1983, the district court entered an order noting that the interests of fairness to all parties concerned, the avoidance of multiplicity of judicial time and effort, and the avoidance of piecemeal litigation weighed against exercise of its jurisdiction. Accordingly, it stayed the federal action pending final adjudication of the state action. [A., p. 294]. R & S now appeals this order. [A., p. 295].

ARGUMENT

Contrary to the appellant's assertions, 28 U.S.C. §1332 grants only "a statutory *privilege* of access to a federal court *which is not absolute.*" *P. Biersdorf & Company, Inc.* v. *Duke Laboratories,* 92 F. Supp. 287 (S. D. N. Y. 1950). (emphasis added). While it is settled that the pendency of an action in the state court alone is no bar to proceedings concerning the same matter in the federal court having jurisdiction, it is equally well settled that a district court is "under no compulsion to exercise that jurisdiction." *Brillhart* v. *Exess Insurance Company,* 316 U. S. 491 (1942). The district court has the power to dismiss or stay proceedings pending adjudication of a concurrent action in state court as an exercise of its inherent power to control the disposition of the cases on its docket.

Landis v. *North American Company,* 399 U. S. 248 (1936). Although this power is usually exercised under the abstention doctrine, the district court may also exercise this inherent power when considerations of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation so require." *Colorado River Water Conservation District* v. *United States, supra.* The Supreme Court in three recent decisions, has set out factors to be considered by the district court in determining whether a dismissal or a stay of the federal action in deference to a state action is proper. Those factors are: 1) the forum in which the action was first filed; 2) the inconvenience of the federal forum; 3) whether either court has assumed jurisdiction over the res; 4) avoidance of piecemeal litigation; 5) whether issues of federal law or policy are present; and 6) whether the state court is adequate to protect the rights of the parties in the federal action. See, *Colorado River Water Conservation District* v. *United States, supra, Will* v. *Calvert Fire Insurance Company, supra, Moses H. Cone Hospital* v. *Mercury Construction, supra.* The decision whether to dismiss a federal action in deference to a state action does not rest on a mechanical checklist. Rather, in the last analysis, it is a matter committed to the district court's discretion. In *Will* v. *Calvert Fire Insurance Company, supra,* the court stated:

> "There are sound reasons for our reiteration of the rule that a district court's decision to defer proceedings because of concurrent state litigation is generally committed to the discretion of that court. No one can seriously contend that a busy federal trial judge, confront both with competing demands on his time for matters properly within his jurisdiction and with inevitable scheduling difficulties because of the unavailability of lawyers, parties and witnesses, is not entrusted with a wide latitude in setting his own calendar." at 665.

The order entered by the district court defering to the state court action was proper. As the record demonstrates, the court had before it several briefs from both parties which discussed at length the recent Supreme Court rulings in *Colorado River Water Conservation District* v. *United States, supra, Will* v. *Calvert Fire Insurance Company, supra, Moses H. Cone Hospital* v. *Mercury Construction, supra.* It is obvious to everyone that the court examined the factors weighing against exercise of federal jurisdiction under the guidelines of the recent Supreme Court decisions and entered its order accordingly.

The only clear error which is demonstrated in the record is in the reasoning of the appellant. In this Court, as in the district court, the appellant seizes upon what the Supreme Court says but ignores what the Supreme Court does. Although the Court in *Colorado River Water Conservation District* v. *United States, supra,* stated it had an "unflagging obligation" to exercise jurisdiction, it upheld the decision of the district court *to dismiss* the federal action in deference to the state action. The appellant makes the same error in its analysis of *Colorado River Water Conservation District* v. *United States, supra,* herein that the Court of Appeals made in *Will* v. *Calvert Fire Insurance Company, supra.* Therein the Court of Appeals, based upon the language of the court in *Colorado River Water Conservation District* v. *United States, supra,* as aforestated, entered a writ of mandamus directing the district judge to proceed immediately with the federal action after he had entered an order defering to the state action.

On certiorari, the Supreme Court reversed the Court of Appeals and affirmed the district court's stay. Although the action before the Court of Appeals was on a request for a writ of mandamus, the Supreme Court's holding is applicable to this action on appeal as indicated by the Court in *Moses H. Cone Hospital* v. *Mercury Construction, supra.*

Only in *Moses H. Cone Hospital* v. *Mercury Construction, supra,* has the Supreme Court failed to affirm the district court's entry of an order dismissing or staying a federal action pending adjudication of the concurrent state action. However, as the court noted, the defendant therein made no showing of circumstances to justify the stay of the federal action. The appellant herein similarly represents to this court that this appellee made no showing before the district court to justify a stay of the federal action. As the record demonstrates, this is simply not true. The critical factors which the defendant in *Moses H. Cone Hospital* v. *Mercury Construction, supra,* failed to demonstrate were clearly proven by the appellee in the district court.

First, the court in *Moses H. Cone Hospital* v. *Mercury Construction, supra,* noted that there was no contention that the federal forum was any less convenient to the parties than the state forum. Herein, because of the nature of the suit, and because the distance to the situs of the federal forum is more than twice the distance to the situs of the state forum from the facility negligently designed, constructed and installed by the appellant and its sibling domestic corporations, the federal forum is less convenient.

Secondly, and more importantly, the court in *Moses H. Cone Hospital* v. *Mercury Construction, supra,* found that the concurrent federal action would not cause a piecemeal

resolution of the parties underlying disputes. Because all of the parties before the state court are not present in the federal action, a piecemeal resolution of the issues raised concurrently in the federal and state actions will be required unless the district court's order is affirmed.

Thirdly, in *Moses H. Cone Hospital* v. *Mercury Construction, supra,* the court found that although the state action was first filed, the parties, in the federal action, had taken most of the steps necessary to resolve the issues therein presented whereas there was no substantive proceedings in the state action. As the appellant is quick to point out, the federal action herein had proceeded no further toward resolution than the state action at the time the stay order was entered. The appellee submits that the reason that the state action has not proceeded further was due to the actions on the part of the appellant in wrongfully removing the suit from state court. Also, this Court should note that the appellant propounded interrogatories and a request for production of documents in the federal action simultaneously with the service of its complaint so as to put itself in a posture to argue that the progress of the concurrent actions were similar. The fact is that the action was filed in state court some four months prior to the institution of the federal action and the state court should hold jurisdiction of the cause of action to the exclusion of the federal court until the state court's duty is fully performed and the jurisdiction involved is exhausted. *Callis* v. *Keystone Mutual Casualty Company,* 172 F. 2d 826 (6th Cir. 1949). See also, *Bowles* v. *Lee,* 50 F. Supp. 639 (D. C. Ky. 1945).

Fourthly, *Moses H. Cone Hospital* v. *Mercury Construction, supra,* dealt with issues of federal law and federal policy. As the court therein noted, "the presence of federal law issues must be a major consideration weighing against

surrender of the action" to the state court. There are no federal issues presented herein which require the particular expertise of the district court. Rather, this is an action based on diversity jurisdiction which requires the district court to apply state law in the resolution of all substantive issues. See, *Will* v. *Calvert Fire Insurance Company, supra.*

Lastly, the court in *Moses H. Cone Hospital* v. *Mercury Construction, supra,* found that the state proceeding was inadequate to protect the rights of the plaintifff in the federal action. The court warned that if there is any substantial doubt as to whether the concurrent state action would be an adequate vehicle for the complete and prompt resolution of the issues between the parties "it would be a serious abuse of discretion to grant the stay or dismissal at all." at 765. There is no indication that the state court litigation would be an inadequate vehicle for the complete and prompt resolution of the issues between the parties or that the appellant's rights will not be adequately protected in the state action. See, *Brendle* v. *Smith,* 46 F. Supp. 522 (S. D. N. Y. 1942). Rather, the appellee has demonstrated that the district court's deference to the state court action avoids piecemeal litigation.

It is clear that the district court's stay in deference to the state action was proper. There is nothing in the appellant's motion to indicate that the district court committed clear error or abused its discretion in entering the order staying the federal action. It is obvious that the appellant's motion is nothing more than a continuation of its efforts to disconcert and encumber the appellee with spurious motions and pleadings. Its motion should be dismissed summarily.

Likewise, there is no merit in the appellant's assertion that it needs a federal forum because of possible prejudice.

First, its statements that the appellee is one of the largest coal operators in the county and that its officials, employees and attorneys, wield a heavy financial and political influence in the community is untrue and is a total fantasy in the mind of the author of the appellant's motion. To suggest that a local attorney or businessman would wield more political influence than the former governor of this Commonwealth who was also a federal judge on the bench of the very forum the appellant now seeks is sheer nonsense. Secondly, the appellee is at a total loss in understanding the appellant's reasoning that it might incur possible prejudice in the state action because coal mining is the principle industry in Letcher County, Kentucky, the situs of the state court action. Coal mining is likewise the principle industry in the county of the situs of the federal forum. Moreover, the appellant's sibling corporations who negligently constructed and installed the facility in Letcher County, Kentucky, are domestic corporations with a principal place of business in Harlan County, Kentucky, an adjoining county, and which employed local people in its negligent construction and installation of the facility. There is no factual basis to believe that the appellant and its sibling corporations will be in any way prejudiced in the state court. Contrary to the appellant's assertions, there was no "tactic" in the appellee filing its complaint in the state court. The wrongful actions of the appellant took place in Letcher County, Kentucky, and accordingly the appellee filed its complaint in the Letcher County Circuit court.

Nor should this court vacate the stay below pending appeal as the appellant requests. Mr. Justice Frankfurter writing for the majority in *Brillhart* v. *Excess Insurance Company, supra,* stated:

> "It would be uneconomical as well as vexatious for a federal court to proceed in a suit where another suit is pending in a state court, presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided." at page 295.

The remedy sought by the appellant in its motion asks this Court to continue the uneconomical and vexatious dual posture of this case pending appeal. This is nothing more than an attempt on the part of the appellant to wrongfully shift the burden of this appeal onto the appellee. Moreover, it would be burdensome to the district court. The problem from which this appeal eminates was not created by the appellee. It was the appellant which, after failing in its wrongful attempt to have the state court action removed, filed this uneconomical and vexatious concurrent action in federal court. The district court recognized this and accordingly entered its stay order. The warning of Mr. Justice Frankfurter should certainly be heeded by this Court at least until this Court has the benefit of the appellee's arguments on the merits as presented in its brief and oral argument. To do otherwise would circumvent the appellee's rights on appeal.

CONCLUSION

The record demonstrates that the stay order was the proper result of the district court's sound discretion based upon the guidelines established by the Supreme Court as aforestated. There is no error, clear or otherwise. Therefore, the appellant's motion should be dismissed.

Polly, Craft, Asher & Smallwood
(s) Ronald G. Polly
Ronald G. Polly
Gene Smallwood, Jr.
P.O. Box 786
Whitesburg, Kentucky 41858
(606) 633-4469

Cook & Wright
(s) Forrest E. Cook
Forrest E. Cook
P.O. Box 909
Whitesburg, Kentucky 41858
(606) 633-4469
Attorneys for Defendant-Appellee

(Certificate of service omitted in printing.)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-5551

ROBERTS & SCHAEFER COMPANY, - *Plaintiff-Appellant*

v.

LAKE COAL COMPANY, INC., - - *Defendant-Appellee*

ORDER—Filed November 3, 1983

BEFORE: JONES, KRUPANSKY and WELLFORD, Circuit Judges.

Upon consideration of the plaintiff's motion to transmit a state court record to this Court and to summarily reverse the district court's order, or, alternatively, to advance this cause for an expedited oral argument,

It is concluded that the plaintiff has failed to meet its burden of showing entitlement to transmit the record. However, the motion to advance this cause is hereby granted.

ENTERED BY ORDER OF THE COURT
John P. Hehman
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-5551

ROBERTS & SCHAEFER COMPANY, - *Plaintiff-Appellant,*

v.

LAKE COAL COMPANY, INC., - - *Defendant-Appellee.*

On Appeal From the United States District Court for the Eastern District of Kentucky

Filed November 20, 1984

BEFORE: KEITH and CONTIE, Circuit Judges; and PECK, Senior Circuit Judge.

CONTIE, Circuit Judge. Roberts & Schaefer Company (R&S) appeals from a district court order staying proceedings in this diversity action pending the outcome of a concurrent state court action.[1] We reverse and remand with instructions for the district court to exercise jurisdiction.

In September 1981, the parties executed a written contract under which R&S would construct a coal washing plant for Lake Coal Company, Inc. (Lake) in Letcher County, Kentucky. R&S employed two subcontractors. On

---

[1]The district court's order is appealable. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, — U. S. —, 103 S. Ct. 927, 933-35 (1983).

November 12, 1982, Lake filed a complaint in state court against R&S and the subcontractors alleging breach of contract, negligent design, construction and installation, breach of warranties and fraud. R&S asserted a counterclaim for the contract price.

Although the presence of the subcontractors as parties destroyed complete diversity, R&S attempted to remove the action on the ground that the subcontractors had been joined as defendants solely for the purpose of defeating federal diversity jurisdiction. The district court disagreed with R&S and remanded the action to the state court because federal jurisdiction was absent.

R&S then filed this action against Lake, essentially pleading the counterclaim that it had filed in state court. The subcontractors were not joined. Lake answered and filed its counterclaim for breach of contract, negligence, breach of warranties and fraud. Lake then moved to dismiss or to stay this action, which now involves the same issues as the state court action. The district court stayed this action pending the outcome of the state court proceedings because "no good cause has been shown to justify litigating the same issues simultaneously in two different judicial systems" (App. at 294) and because fairness to the parties and the avoidance of multiplicitous and piecemeal litigation counseled against exercising concurrent jurisdiction.

The general rule is that the prior pendency of a state court action does not bar concurrent federal proceedings on the same matter. *See Will* v. *Calvert Fire Insurance Co.*, 437 U. S. 655, 662 (1978); *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800, 817 (1976). Indeed, federal courts have a "virtually unflaging obligation" to exercise their jurisdiction. *Moses H. Cone Hospital* v. *Mercury Construction Corp.*, ____ U. S. ____,

103 S. Ct. 927, 936 (1983); *Colorado River Water*, 424 U. S. at 817. Nevertheless, a district court may sometimes decline to exercise jurisdiction where a state court action on the same issues is pending. The purpose of this limited exception to the duty to exercise jurisdiction is to conserve judicial resources and to promote comprehensive disposition of litigation. *See Colorado River Water*, 424 U. S. at 817. The exception is even narrower than the abstention doctrine. *Id.*, at 818.

In deciding whether or not to exercise jurisdiction in this type of case, a district court must determine whether there exist "exceptional circumstances" that justify not doing so. *See Moses H. Cone Hospital*, 103 S. Ct. at 942. Since "only the clearest of justifications," *Id.; Colorado River Water*, 424 U. S. at 819, will warrant a stay, the burden of persuasion is upon the party seeking the stay. Moreover, the parties agree that a district court must evaluate several factors, no one of which is determinative, in reaching its decision: (1) whether the state action is an action *in rem*, (2) whether the federal and state actions have progressed to the same stage,[2] (3) whether the federal forum is convenient, (4) whether the state proceedings are adequate; (5) whether the substantive claims involve federal or state law and (6) whether piecemeal litigation will be created or avoided depending upon whether the federal action is stayed.

We hold that the district court erred in assigning the burden of persuasion. Although the burden was upon Lake to show "exceptional circumstances" amounting to the "clearest of justifications" for not exercising federal juris-

---

[2]The progress of the federal and state actions is more relevant than the times of filing of the respective complaints. *See Moses H. Cone Hospital*, 103 S. Ct. at 940.

diction, the district court's order indicates that the court required R&S to show good cause why concurrent jurisdiction should be exercised. This error alone is sufficient to warrant reversal.

Furthermore, we hold that "exceptional circumstances" do not exist in this case. First, the state court action is not an action *in rem*. Second, the federal and state actions have progressed to about the same stage of discovery. Third, the federal court is only about fifty-three miles from the construction site. Fourth, both the federal and state courts appear capable of adjudicating the parties' claims and affording appropriate relief. Thus, none of the first four factors enumerated above augurs in favor of staying the federal action pending the outcome of the state proceedings.

Fifth, although both the federal and state actions involve solely questions of state law, Lake has not demonstrated either that the state law issues are so difficult or that state law is so unsettled that state court expertise is required. Accordingly, the fifth factor listed above does not constitute an exceptional circumstance justifying a refusal to exercise federal jurisdiction.

The final factor is whether piecemeal litigation will be created or avoided depending upon whether the federal action is stayed. Lake contends that piecemeal litigation will result if the federal action is not stayed because the subcontractors, whom Lake sued in state court, are not parties to the federal action. Having reviewed the arguments and the record submitted by the parties, we hold that Lake has not shown either that piecemeal litigation likely will occur if the federal action is not stayed or likely will be avoided if the federal action is stayed.

As to the former point, it is noteworthy that the subcontractors are not parties to the September 1981 contract.

Moreover, Lake has not shown that it has an arguably valid claim under Kentucky law against the non-signatory subcontractors. In short, Lake has not shown that the absence of the subcontractors in the federal action will result in Lake filing a separate action against them. Moreover, piecemeal litigation could occur in the state courts in the form of a separate action by R&S against the subcontractors if R&S is held liable to Lake for damages. Hence, piecemeal litigation may not be avoidable even if the federal action is stayed.

The judgment of the district court is REVERSED and the case is REMANDED with instructions to exercise jurisdiction.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-5551

ROBERTS & SCHAEFER COMPANY, - *Plaintiff-Appellant*

v.

LAKE COAL COMPANY, INC., - - *Defendant-Appellee*

ORDER—Filed December 21, 1984

Before: KEITH and CONTIE, Circuit Judges; and PECK, Senior Circuit Judge.

Lake Coal Company, Inc. has filed a petition for rehearing in the above-captioned case under Federal Rule of Appellate Procedure 40. This court considered the arguments made in the petition when making its original determination. The panel adheres to its decision entered on November 20, 1984. The petition for rehearing is DENIED.

ENTERED BY ORDER OF THE COURT.

(s) John P. Hehman
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-5551

ROBERTS & SCHAEFER COMPANY, - *Plaintiff-Appellee,* [sic]

v.

LAKE COAL COMPANY, INC., - *Defendant-Appellant.* [sic]

ORDER—Filed January 4, 1985

Upon consideration of the appellee's motion to stay the mandate pending application for writ of certiorari,

It is ORDERED that the motion be and it hereby is granted and the mandate is stayed until February 4, 1985.

ENTERED BY ORDER OF THE COURT.

(s) John P. Hehman
John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-5551

ROBERTS & SCHAEFER COMPANY, - *Plaintiff-Appellant,*

v.

LAKE COAL COMPANY, INC., - - *Defendant-Appellee.*

ORDER—Filed January 16, 1985

Upon consideration of the appellant's motion to reconsider this Court's order entered on January 4, 1985;

It is ORDERED that the motion be and it hereby is denied.

ENTERED BY ORDER OF THE COURT.

(s) John P. Hehman
John P. Hehman, Clerk